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WASHINGTON REPORTS
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CASES DETERMINED
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OF
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JUDGES
OF THE
SUPREME COURT OF WASHINGTON

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*Appointed June 7, 1915, to succeed Hon. John E. Humphries, deceased.

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ERRATA

Page 127, 2d syllabus, line 2, for and read an

Page 379, 1st syllabus, line 2, for supreme read superior

CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 11230. *En Banc*. June 3, 1915.]

THE STATE OF WASHINGTON, *Appellant*, v.
C. K. STURTEVANT *et al.*, *Respondents*.¹

NAVIGABLE WATERS—LANDS UNDER WATER—RIGHTS OF OWNER—STATUTE. Under 3 Rem. & Bal. Code, § 8173-1, providing that the water boundary of second-class shore lands on navigable waters, purchased from the state, when not defined in grants theretofore made, shall be the line of ordinary navigation, and upon the lowering of such waters by state or Federal action such water boundary shall thereafter be held to be the line of ordinary navigation as the same shall be found in such waters after such lowering, and granting and confirming all such lands to such purchasers, a grant of shore lands is made in contemplation of a change in physical conditions and that a new line of navigability will be assimilated on a lowering of the waters; but, until that change occurs, the established harbor line is the limit of the fixed title of the shore owners; hence the relative rights of shore owners and occupants of lands in front of the present line of navigability is determined by the granting act *supra*.

NAVIGABLE WATERS — IMPROVEMENTS — WHO MAY COMPLAIN. Improvements outside the inner harbor line are presumptively in navigable waters, but, where the state is the only party having a present interest therein, a private abutting owner of the shore lands cannot complain.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered January 2, 1913, in consolidated actions to quiet title, dismissing plaintiff's cause of action and granting affirmative relief to defendants. Affirmed in part and reversed in part.

¹Reported in 149 Pac. 33.

The Attorney General and R. E. Campbell, Assistant, for appellant.

Farrell, Kane & Stratton and G. E. Steiner, for respondents Sturtevant et al.

James B. Bruen, for respondent Powell Investment Company.

William C. Keith (Donworth & Todd, of counsel), for respondents Schertzer et al.

Paul W. Houser, John F. Murphy, Robert H. Evans, James E. Bradford, R. S. Pierce, Preston & Thorgrimson, and Benton Embree, amici curiae.

ON REHEARING.

PER CURIAM.—The parties to this action, the Sturtevents and Schertzers, have each asked us to reconsider our decision, *State v. Sturtevant*, 76 Wash. 158, 176, 135 Pac. 1035, 138 Pac. 650.

Counsel for the Sturtevents insist that we should more accurately define the right of their clients to assert title to the land occupied by the Schertzers pending an actual physical lowering of the waters of Lake Washington; that their title, with all its incidents of exclusive possession, attaches, (a) at the theoretical line of navigation, or the inner harbor line, and that there can be no occupation in waters beyond that line which would interfere or be inconsistent with its use; (b) at the inner harbor line as it may be subsequently fixed, without reference to the time when the waters of the lake are physically lowered.

Theoretically, and if the question should be determined by reference to former decisions of this court alone, we think the proposition (b) would necessarily prevail, but we are met by the act of March 25, 1913, Laws of 1913, p. 667, ch. 183, § 1, which provides:

“In every case where the state of Washington has heretofore sold to any purchaser from the state any second class shore lands bordering upon navigable waters of this state

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Opinion Per Curiam.

by description wherein the water boundary of the land so purchased is not defined, such water boundary shall be held and is hereby declared to be the line of ordinary navigation in such water; and whenever such waters have heretofore been or shall hereafter be lowered by any action done or authorized either by the state of Washington or the United States such water boundary shall thereafter be held and is hereby declared to be the line of ordinary navigation as the same shall be found in such waters after such lowering, and there is hereby granted and confirmed to every such purchaser, his heirs and assigns, all such lands." (3 Rem. & Bal. Code, § 8173-1.)

Under the accepted rules of construction, we are required to give effect to all of the provisions of the act quoted. The legislature has assumed to say when the title to the new made lands shall attach. It says "after such lowering." Whatever title the owner of shore lands takes to the new lands made by the lowering of the waters of Lake Washington is granted by the act of 1913. They are not taken by purchase, except as the grant is made to relate back to the original deed. The act is not only a grant, but a confirmation of the grant. This being so, it was well within the power of the legislature to fix a time for the enjoyment of the grant. The grant is made in consequence of a contemplated change in physical conditions. Until these changes occur, the owners of the present shore lands cannot complain, for their title is floating and will not attach until the situation contemplated in the grant has become a fixed condition. In the meantime, the line of navigability, i. e., the present or formerly established harbor line, is the limit of the fixed title of the shore owners. When the new inner harbor line is fixed and the waters are actually lowered, it would assimilate the line of navigability without reference to the depth of the water over which it is run.

It seems to us that these conclusions are sufficiently clear in our opinion and the opinion on rehearing. If not, it may now be understood that it was our intent and, as we thought,

our holding, that whatever the rights of the Sturtevents may have been under our former decisions, the legislature has made the time when the grant attaches depend upon a future happening of a physical fact, and the present relative rights of the parties as to occupancy of the lands in front of the present line of navigability or inner harbor line is determined by such granting act, and not as we would have held, that is, proposition (b), had it not been for the act of 1913.

As for proposition (a), improvements outside of the inner harbor line are presumptively in the navigable waters of the lake. The state is the only party having a present interest therein and it is not complaining.

The Schertzers invite us to reconsider the question of *res judicata*. We have done so, and are satisfied with our former holding.

The petitions of the respective parties are denied.

[No. 11843. Department One. June 3, 1915.]

THE CITY OF SPOKANE, *Respondent*, v. BURTON J. ONSTINE
et al., *Appellants*.¹

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS. Where a city proceeded with the improvement of a street, and at the same time established a change of grade therefor, levying an assessment for the benefits created by the improvement, it might subsequently institute proceedings under the eminent domain law (Rem. & Bal. Code, § 7768 *et seq.*) for the purpose of assessing benefits for the change of grade, and cannot be charged with making a double assessment, since the two assessments are made for two separate benefits.

SAME—PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS. Under Rem. & Bal. Code, § 7820, providing that, if any city has damaged any property for any of the purposes mentioned in the eminent domain act without having made just compensation therefor, such city may cause such compensation to be ascertained by proceedings taken in accordance with the provisions of such act, the court would

¹Reported in 149 Pac. 1.

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Syllabus.

have jurisdiction to entertain such proceeding notwithstanding the fact that the change of grade and the improvement were ordered by the city at the same time, as virtually one improvement, but assessment had been levied only for the street improvement and not the change of grade.

SAME. Under Rem. & Bal. Code, § 7787, providing that, upon petition therefor, the court shall appoint the eminent domain commission of a city, if there be one, to assess the cost of an improvement and apportion the judgment for damages over the assessment district, and Id., § 7820, providing that, where the compensation for damaged property has not been ascertained prior to the time the improvement is made, the council may ascertain the amount of the compensation by proceedings taken in accordance with the provisions of the eminent domain act, the eminent domain commissioners of the city had power to assess benefits as well as ascertain the compensation due, since the whole statute implies that such assessments shall be laid according to relative benefits.

SAME—STREETS—CHANGE OF GRADE—RIGHT TO DAMAGES. Where property has been improved with reference to a paper grade, the owner is entitled to compensation for any damages suffered by a subsequent actual change in the grade from the former paper grade.

SAME—IMPROVEMENTS—PROCEEDINGS TO ASSESS COMPENSATION—PARTIES. Only property owners whom the city believes damaged by street improvements are necessary parties to a condemnation suit by the city, property owners omitted having the right of intervention or of bringing an original action in their own behalf.

SAME—ASSESSMENT OF BENEFITS—APPEAL. The action of city eminent domain commissioners in apportioning assessments according to benefits will not be disturbed on appeal, where it does not appear from the record to be so arbitrary or unjust as to amount to an abuse of discretion.

SAME—ASSESSMENT OF BENEFITS—OFFSETTING DAMAGES. In a hearing upon the assessment roll prepared by the eminent domain commission, after condemnation proceedings, property owners are not entitled to offset their damages against the assessments, since the only question the court can try is whether there was an equable and ratable assessment upon the property benefited, the question of damages being one to be assessed by a jury in a proper proceeding therefor.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. The rejection of claims for damages for the taking of property without compensation because not filed within thirty days after the injury, as required by statute and ordinance for claims sounding in tort, while error, was not prejudicial, where the testimony was incompetent upon the hearing on an assessment roll.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered July 3, 1913, confirming an assessment roll made by eminent domain commissioners. Affirmed.

Happy & Happy, R. L. Edmiston, C. F. Cowan, H. S. Stoolfire, and Burcham & Blair, for appellants.

H. M. Stephens, Wm. E. Richardson, Ernest E. Sargeant, and Dale D. Drain, for respondent.

CHADWICK, J.—Sixth avenue, in the city of Spokane, had been improved and maintained at grade for many years. In June, 1910, the city council passed ordinance No. A-5,256, calling for paving and curbing the street in accordance with plans and specifications then adopted. At the same time the council, by ordinance No. A-5,288, re-established the grade of Sixth avenue as shown by the plats, plans and profiles attached to ordinance No. A-5,256. The improvement ordinance provided that the cost of the improvement should be assessed and levied against the property benefited according to the benefit sustained. The cost and expense of the improvement was to be assessed by the city council. The street was improved. An assessment roll was prepared and confirmed by the council in August, 1910. Some of the protesting owners paid the amount of their assessment. In November, 1911, it appearing that no account had been taken of the damages which might have been suffered by property owners, and that numerous suits for damages were pending against the city, the city commissioners passed an ordinance directing the corporation counsel to begin an action to condemn the property abutting on Sixth avenue between Monroe street and Cannon street. Section two of the ordinance provided that "the cost and expense of said improvement shall be paid wholly or in part by special assessment upon the property benefited," and that such assessments should be collected in the manner provided by the act of March 13, 1907, granting cities the power of

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eminent domain. Suit was accordingly brought against several property owners, resulting in verdicts "without deducting any of the benefits which will accrue to said property by reason of said change of grade." Upon the entry of the judgment, the petitioner asked, and the court made, an order referring the matter to the eminent domain commission of the city for an assessment upon the property benefited to pay the judgment. From an order confirming the roll returned by it, these protesting property owners have appealed.

The record is confused, and it is apparent that counsel do not agree as to what occurred, or as to the nature and character of this proceeding. Our understanding of the several contentions of the appellants will be stated as we proceed.

First: It seems to be understood by the appellants that the assessment to pay the judgment in the eminent domain case is so interwoven with the improvement of the street as to be a nonseverable part thereof; that damages to property owners as for a change of grade is in fact a part of the cost of the improvement, and the city, having made and confirmed an assessment for the improvement, cannot, by a later proceeding, make an assessment to pay the resultant damages. We have no doubt that the city might have so proceeded, but it did not. The measure of the city's authority is found in the statute, but that measure must be gauged by the object and purpose of the law. When so considered we are not disposed to hold that the city exhausted its power to cure an omission in the proceeding. Indeed, the fact that it might, and, as appellants contend, should have done so in the first instance, is an argument in favor of the present proceeding. While the result is two assessments, it is not a double assessment. A double assessment results where two assessments are made for the same benefit. Here the improvement of the street was one benefit and the change of the grade was another benefit.

While there is no specific statute upon which to rest our judgment, there is no statute denying the right, and, keeping the object and not the conveniences of the law in mind, we find no merit in this contention.

Second: It is claimed that there is a lack of jurisdiction, in that the benefits should have been assessed by the council. To sustain this contention we must treat this proceeding as one depending upon ordinances No. A-5,256 and No. A-5,288, in which it was so provided. Having held that the eminent domain proceeding is a separate proceeding depending upon the statute and not upon the ordinance of the city, it follows that this contention is not well sustained. The statute provides:

"If any city has heretofore taken or shall hereafter take possession of any land or other property, or has damaged or shall hereafter damage the same for any of the public purposes mentioned in this act, . . . without having made just compensation therefor, such city or town may cause such compensation to be ascertained and paid to the persons entitled thereto by proceedings taken in accordance with the provisions of this act." Laws of 1907, p. 389, § 53 (Rem. & Bal. Code, § 7820).

Irrespective of these considerations, but without so deciding, it would seem that the logic of several of our decisions would lead us to the holding that the city might submit itself to an action for damages in such cases and still invoke the act of 1907 in aid of an assessment to meet the judgment.

Third: It is contended that the act of 1907, Laws of 1907, p. 316, ch. 153 (Rem. & Bal. Code, § 7768 *et seq.*), did not give the eminent domain commissioners the power to assess benefits in such cases, but only to ascertain the compensation due those entitled thereto by reason of the property taken or damaged. Appellants rely upon § 53 of the act, but manifestly their contention is not a fair reading of the statute or of that section of the statute. Section 53 (*Id.*, § 7820) also provides that, where the compensation for damaged property has not been ascertained prior to the time the improvement is

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made, the council may ascertain the amount of the compensation "by proceedings taken in accordance with the provisions of this act. It did so. Section 20 (Id., § 7787) of the act provides that, upon petition therefor, the court shall appoint the eminent domain commission of the city, if there be one, to assess the cost of the improvement and apportion the judgment for damages over the assessment district. Having followed the permissions and directions of the statute, it cannot be held that the eminent domain commissioners had no power to assess benefits, for the whole statute implies, and we have frequently held, that such assessments shall be laid according to relative benefits.

Fourth: It is contended that it was error to allow damages to those made defendants in the eminent domain proceedings, because the change in the grade was no more than a change in the former paper grade; that until an actual improvement of the street had been made to conform to an established grade, no damages should have been allowed under the rule, now well established in this state, that an original grade may be made without meeting any consequential damages to abutting property. We take it from the record, because we do not find it disputed, that the property affected had been improved with reference to the paper grade. Under *Spokane v. Ladies' Benevolent Society*, 83 Wash. 382, 145 Pac. 448, such owners were entitled to compensation as for a change of grade. Other reasons suggest themselves to the writer, but this is enough to sustain the judgment in this respect.

Fifth: It is asserted that all property owners were not made parties to the condemnation suit. It was not incumbent upon the city to begin an action against any other than those it believed were damaged. If any property owner rested under contrary belief, he might have intervened or brought an original action in his own behalf. *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820.

Sixth: It is finally contended that the assessment was inequitably laid and that appellants are called upon to pay a greater proportion of the cost than property similarly situated. Reference to the plat alone would indicate that this might be true as to some of the appellants, but taking the whole record, we are not prepared to say that it would sustain a finding that the assessment is so arbitrary or unjust as to amount to an abuse of discretion. It shows no more than a difference of opinion between the commission and the property owner. *In re Boyer Avenue*, 79 Wash. 664, 141 Pac. 58; *In re Ninth Avenue etc.*, 79 Wash. 674, 141 Pac. 61; *Spokane v. Fonnell*, 75 Wash. 417, 135 Pac. 211; *In re Fifth Avenue and Fifth Avenue South*, 66 Wash. 327, 119 Pac. 852; *Viegle v. Spokane*, 78 Wash. 359, 139 Pac. 33.

Seventh: Some of these appellants who believe their property was damaged by the regrade, if the law be as we have declared it to be, sought to offset their damages at the hearing upon the assessment roll against the amount that had been assessed by the eminent domain commission. Counsel for the city objected upon the theory that such claims should have been filed under the statute and city ordinance within thirty days after the damage or right of action had accrued. The court rejected this offer, apparently upon that ground. This was error under the case of *Kincaid v. Seattle* and the cases following it. But it does not follow that the error was prejudicial. As we have frequently said, we will not concern ourselves with the manner in which a trial judge reaches his conclusion. We think, clearly, that the testimony was incompetent to serve any purpose upon the hearing. The only question the court could try was whether there was an equable and ratable assessment upon the property benefited. Neither the court nor the eminent domain commission had any power to take into consideration any damage that the property might have suffered by reason of the change of grade. The law has provided that such damages shall be assessed by jury. Appellants should have brought an action against the city,

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or, as we have heretofore suggested, intervened in the eminent domain case. Not having done so, they cannot be heard in this proceeding. If they have suffered damage they still have their remedy against the city, subject, of course, to all legal defenses.

Finding no reversible error, the case is affirmed without prejudice to those property owners who maintain that their property has been damaged to bring an action to ascertain the amount thereof.

MAIN, ELLIS, and CROW, JJ., concur.

[No. 11736. Department One. June 8, 1915.]

M. WISE, Plaintiff, v. JOSEPHINE REED *et al.*, Defendants and Respondents, CARL W. SWANSON, Garnishee Defendant and Appellant.¹

GARNISHMENT—PROTECTION OF GARNISHEE'S LIEN—ATTORNEY AND CLIENT—LIEN FOR SERVICES. Where a garnishee defendant had, as an attorney, the possession of and a lien upon the note which was the subject of controversy between the principal parties, upon determining the title to the note, it is error to order delivery of the note subject to the attorney's lien, to be paid to the garnishee when the note is paid; and the order for delivery should first provide for payment of the attorney's lien.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered July 9, 1913, against a garnishee, after a trial to the court. Modified.

C. E. Ellis, for appellant.

Arthur W. Davis and Harry A. Rhodes, for respondents.

ON REHEARING.

PER CURIAM.—As said in our former opinion, 79 Wash. 134, 139 Pac. 753, the delivery of the note mentioned therein to respondent was subject to the payment of \$30 to the gar-

¹Reported in 149 Pac. 325.

nishee appellant, who is an attorney at law and who had rendered services for the principal defendant. He had possession of the note and asserts a lien thereon. The trial judge ordered that the garnishee defendant deliver the note to the sheriff and that it be delivered "by the sheriff to the said Josephine Reed subject to the claim of thirty (\$30) dollars, payable to the said garnishee defendant upon said note being paid."

Appellant has filed a petition asserting that such order is destructive of his lien; that, in lieu thereof, he is put to an independent remedy and the hazard of the financial responsibility of the judgment creditor. While it is likely that the trial judge did not so intend, the order is susceptible to the construction put upon it by counsel.

Appellant, the garnishee defendant, appealed to this court, setting up many assignments of error, most of them going to the merit of the case, and to sustain the title of Mrs. Lilly M. Martin, who claimed to be the owner of the note. He did not set up any claim of lien in his pleadings, nor did the court make a specific finding that he had a lien, although that is the effect of its finding and judgment.

The power of the court is measured by the statute, and under a strict interpretation, if appellant had an interest payable out of the note, the court was powerless to order it turned over to the sheriff and by him to be turned over to the judgment creditor.

The order of the court will be modified to this extent: that appellant shall turn the note over to the sheriff upon payment of \$30 by the judgment creditor, Miss Josephine Reed. The merit of the case having been sustained by respondent, she will recover her costs.

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Syllabus.

[No. 12406. Department Two. June 8, 1915.]

**FRANK DAVIS, a Minor, Respondent, v. THE CITY OF
WENATCHEE, Appellant.¹**

MUNICIPAL CORPORATIONS—CONTRACT FOR IMPROVEMENTS—VALIDITY—INDEPENDENT CONTRACTORS—TORTS—LIABILITY OF CITY. An understanding arrived at by correspondence between the water commissioner of a city of the third class and contractors, whereby they undertook to dig trenches in the streets for water mains, involving an expenditure of over \$500, is not a valid contract of the city whereby the contractors would be independent contractors, in view of Rem. & Bal. Code, § 7694, requiring street contracts requiring an expenditure of \$500 to be let to the lowest bidder; and in view of the city ordinances requiring certain provisions in such contracts, and the taking and approval of indemnity bonds securing performance of the same.

SAME—TORTS—PUBLIC IMPROVEMENTS—INDEPENDENT CONTRACTORS—LIABILITY OF CITY—ESTOPPEL. Where a city permits street work to be done without any valid contract therefor and accepts the benefits thereof, it cannot claim that the persons doing the work are independent contractors instead of servants of the city, and therefore it cannot escape liability for the negligence of such parties, on the plea that it was acting *ultra vires*.

SAME—PUBLIC IMPROVEMENTS—TORTS—LIABILITY—EXPLOSIVES—FAILURE TO SAFEGUARD. A city is liable for negligence in failing to safeguard explosives, known by it to be used by its agents and employees in digging trenches in the streets, where dynamite caps and fuse were left in an untied sack upon the parking strip after work for the day was done, and a child found the same and was injured by the explosion of a cap.

SAME—TORTS—NOTICE TO CITY. Where a city is doing work through its own employees, it is charged with notice of their negligent acts in using and failing to safeguard explosives used in the work.

TRIAL—INSTRUCTIONS—CONSTRUCTION. Error cannot be predicated upon a detached part of an instruction, which was not erroneous when taken in its context, and reading the instruction as a whole.

NEGLECT—CARE AS TO CHILDREN—EXPLOSIVES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The contributory negligence of a boy, eleven years of age, in holding a lighted fuse in a dynamite cap, is a question for the jury, where he testified that he did not

¹Reported in 149 Pac. 337.

know what the cap was, and used it to hold the fuse to avoid burning himself and he thought the lighted fuse would only "fizz."

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$2,750 for the loss by a boy, eleven years of age, of the first two joints of the thumb and the first two fingers is not so excessive as to indicate prejudice or other illegal motives.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered December 1, 1913, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a minor through the explosion of a dynamite cap. Affirmed.

Fred Kemp and E. L. Baker, for appellant.

Reeves, Crollard & Reeves, for respondent.

ELLIS, J.—This is an action for damages for personal injuries sustained by the plaintiff, a minor eleven years of age, through the explosion of a dynamite cap.

In the spring of 1913, street contractors, Berry & Monary, entered into correspondence with Charles T. White, water commissioner of the city of Wenatchee. The correspondence embodied an offer on the part of the contractors to dig trenches in the streets of the city for water mains, and an acceptance of the offer by White, as water commissioner. The understanding between the contractors and the city never assumed a more definite form than in this correspondence. One of the trenches was being dug in Okanogan avenue, one of the principal thoroughfares of the city, near the west curb of the street. The plaintiff's home is on Okanogan avenue in the same block where the work was in progress.

On the afternoon of April 30, 1913, the workmen left the ditch and the street at five o'clock, one of the employees leaving a gunny sack containing some fuse, dynamite and dynamite caps on the parking strip near plaintiff's home. The sack was untied. Plaintiff and other children were playing about the street and noticed the sack. He and a younger boy looked into it and took one of the caps and a piece of the

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fuse. In order to avoid being seen, these two and another boy still younger went into an alley near the Davis home, and the plaintiff lighted the fuse. Thinking to hold it without burning his hand, he inserted the fuse into the dynamite cap and held the cap in his hand. The cap exploded and injured plaintiff's left hand so severely that it became necessary to amputate the first joints of the thumb and first two fingers of the hand.

The water commissioner did not assume general supervision of the blasting, but, on the afternoon of April 30th, he had been there and instructed the contractors how to blast a rock without injuring a water main already laid in the street. It appears that the gunny sack had been lying on the parking strip, where found by plaintiff, the greater part of the day, and the danger from explosives thus allowed to remain had been commented upon by observers. The trial resulted in a verdict and judgment for \$2,750, and interest, \$110 expenses, and costs of suit. The defendant appeals.

The appellant urges the following grounds for a reversal: (1) that the negligence was that of independent contractors, and that the work was not so inherently dangerous as to impose a liability on the city for the negligence of the contractors; (2) that the court erred in giving certain instructions and in refusing others; (3) that the plaintiff was guilty of contributory negligence as a matter of law. It is also claimed (4) that the judgment is excessive.

I. The first contention presents the initial question, Did Berry & Monary have any valid contract with the city? If not, they were not independent contractors. The city of Wenatchee is a city of the third class. It is conceded that the alleged contract contemplated an expenditure exceeding the sum of \$500. The statute governing the letting of contracts by cities of that class, so far as here material, provides:

" . . . in all street and sewer work, . . . when the expenditure required for the same exceeds the sum of five

hundred dollars, the same shall be done by contract and shall be let to the lowest responsible bidder, after due notice, under such regulations as may be prescribed by ordinance: . . .” Rem. & Bal. Code, § 7694 (P. C. 77 § 345).

An ordinance of the city of Wenatchee, which is in evidence, passed pursuant to this statute, makes the same provision as to contracts requiring an expenditure in excess of \$500, and provides that the contract shall contain:

“Substantial covenants requiring the contractor to direct and maintain during the night time, barriers and lights to prevent accidents, and that the contract shall contain other covenants as experience may necessitate to save the city harmless from damages and to indemnify the city against all liability for failure of the contractor to perform the contract or all liabilities which the city might suffer from the carelessness or neglect of the contractor, the agents, employees or workmen. . . .

“That whenever any work or improvement is let by a contract, the officer of the city letting the contract, shall take a proper surety bond in the amount not less than the contract price, conditioned for the performance of the contract; and also conditioned to indemnify the city against all liabilities which might accrue against the city by failure of the contractor to perform the contract or in any wise resulting from the carelessness or neglect of the contractor, his agents, employees or workmen.

“That such bonds shall be submitted to the city attorney for examination and shall be approved by him and the mayor; and that no contracts shall take effect until the bonds required by the ordinance, properly certified, and approved, shall have been filed.” Ordinance of Wenatchee, No. 179.

It is admitted that no attempt whatever was made to comply with the provisions either of the statute or the ordinance. It is clear that the agreement never took effect as a valid contract. *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063; *Moran v. Thompson*, 20 Wash. 525, 56 Pac. 29; *Green v. Okanogan County*, 60 Wash. 309, 111 Pac. 226; *State ex rel. Craig v. Newport*, 70 Wash. 286, 126 Pac. 637. This phase of the case is not affected by the assumption that, in-

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asmuch as the city had the power by observing the statute and ordinance to make a valid contract, the contract, though made without such observance, was not *ultra vires*, and the city might, therefore, be compelled to pay to Berry & Monary the reasonable value of the work done by them under the invalid agreement. Assuming, without deciding, that this would be the case as between the parties to the contract, under the rule announced in *Green v. Okanogan County*, *supra*, and *Criswell v. Directors of School District*, 34 Wash. 420, 75 Pac. 984, the recovery, nevertheless, would be not upon the contract, but upon a *quantum meruit*. *Hambach v. Ward*, 69 Wash. 351, 125 Pac. 140. The parties would not recover as contractors, independent or otherwise, but as servants or agents of the city, who by their labor had conferred a benefit which was accepted and enjoyed. In other words, the city would be estopped to withhold the reasonable value of the work while retaining the benefit. This, however, would not estop third parties injured by any negligence in the progress of the work, avoidable by reasonable supervision, from maintaining an action against the city as the party primarily liable, on the ground that there was no contract and that it was not only within its power, but that it was its duty, to supervise the work, which it bound no one else to supervise, either by contract let as prescribed by statute, or by bond conditioned as provided by ordinance. The dominant fact is that the city was permitting this work to be done upon its streets and accepting the benefit without any valid contract, in direct contravention of the positive provisions of the statute and ordinance. The situation presented is, therefore, precisely the same as that found in the case of *Collensworth v. New Whatcom*, 16 Wash. 224, 47 Pac. 439. In that case, New Whatcom, a city of the third class, in disregard of this same section of the statute, by mere resolution of its council and without letting any contract, undertook to dig certain ditches for the extension of its water system, by the direct employment of day labor under the supervision of the city

engineer. The estimated cost of the work was in excess of \$500. In the prosecution of the work, a carelessly fired blast injured the plaintiff. The city sought to avoid liability for the injury on the ground that in doing the work by day labor, instead of letting the work to an independent contractor, it was acting *ultra vires*, hence the parties who fired the blast and whose negligence caused the injury were not servants or agents of the city. Holding this view unsound, this court said:

"We think it may be conceded that the resolution of the council above set out did not legally constitute the engineer the agent of the city. But it does not follow that the city can escape liability for the injuries occasioned to the plaintiff by the careless and negligent act of those actually within the control of the corporate authorities engaged in the prosecution of a work ostensibly within the scope of its corporate power. The reasons which would defeat an action brought by a corporation creditor upon a contract attempted to be created in disregard of statutory requirements, or an action brought by the laborers themselves to secure the value of their services, are not applicable to the present action. The creditor or laborer in such cases enters into the contract or renders the service with full knowledge, presumably, that the law forbids that the city should make such a contract, or forbids that the city should undertake the work in which the services were performed. But these reasons are entirely inapplicable when urged in defense of an action of the character brought by the plaintiff herein. His injuries have been sustained, not as a consequence of any act in which he has participated or had knowledge. The respondent cannot be charged with any knowledge of the infirmity of the attempted contract of employment between the city and the persons firing the blast. It is enough, we think, that the city possessed the undoubted authority to construct or extend its water works system, and the mere fact that in attempting so to do it did not conform to the requirements of its charter furnishes no sufficient reason for exempting it from liability for the injury occurring to respondent."

Bearing in mind the fact that, in the case now before us, the work was being performed on the city's streets and for

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the city's benefit and at the city's expense, but under no valid contract, it is at once evident that the language above quoted is directly applicable here. The city possessed the undoubted authority to make excavations in its streets for water mains. The mere fact that in attempting to do so it did not conform to the requirements of the law and its ordinances "furnishes no sufficient reason for exempting it from liability for the injury occurring to the respondent." Having placed the duty of proper supervision of the work upon no one else in the only manner authorized by law, that duty, as a matter of law, still remained with the city. The result of the failure to observe that duty cannot be avoided by the specious plea of a contract invalid on its face and only enforceable even as between the parties thereto, if at all, on the principle of estoppel. It is elementary that estoppels to be available must be mutual. There can be no mutual estoppel as between the city and the respondent, a total stranger to the alleged contract, to deny the contractual relation as relieving the city of its positive duty to provide such adequate supervision of those employed on the work as to avoid dangers reasonably to be anticipated from the negligent use or care of explosives necessarily employed in the performance of the work. It is no argument to say that the respondent has lost no right by reason of the invalidity of the contract. What is more to the point is that the city can gain no immunity by reason of an invalid contract or an invalid mode of performing the work. It was still under the positive duty of providing competent supervision to avoid danger.

There can be no doubt of the appellant's negligence in the premises. The city authorities knew that explosives were necessary and were actually being used in the prosecution of the work. It was its positive duty to exercise reasonable care, not only to avoid negligent use, but negligent abandonment of the explosives upon the street during the progress of the work. It was not only under the general duty to keep its streets free from avoidable damages reasonably to be antici-

pated, but it was also under the same duty to safeguard explosives used by its agents and employees upon the streets as that incumbent upon private persons relative to their own premises under the same conditions. The case thus falls within the rule of liability sustained by this court in such cases. *Crabb v. Wilkins*, 59 Wash. 302, 109 Pac. 807; *Akin v. Bradley Eng. & Mach. Co.*, 48 Wash. 97, 92 Pac. 903, 14 L. R. A. (N. S.) 586; *Olson v. Gill Home Inv. Co.*, 58 Wash. 151, 108 Pac. 140, 27 L. R. A. (N. S.) 884; *Mathis v. Granger Brick & Tile Co.*, 85 Wash. 634, 149 Pac. 3.

These considerations dispose of the appellant's argument based upon our decision in *Wilton v. Spokane*, 73 Wash. 619, 132 Pac. 404. In that case, the work was done under a valid contract creating the relation of an independent contractor in the person performing the work, relieving the city of that strict duty of supervision which would have existed but for the contract. In that case, moreover, the danger was hidden so as not to be discernible by mere inspection. Here there is no contract which the city can invoke to avoid liability to third persons, and the negligence would have been discovered by any sort of supervision.

We find it unnecessary to decide whether, in view of the known necessity of using explosives in the work, the city, even had there been a valid contract, could have avoided liability for the negligence of an independent contractor. Even in such a case, it is admitted that the city would have been liable for injury resulting from negligent firing of a blast, because of the inherent danger of the work imposing the non-delegable duty of supervision. *Freebury v. Chicago, M. & P. S. R. Co.*, 77 Wash. 464, 137 Pac. 1044. In any event, there being no contract, the question is not material here.

II. The court by its instructions took from the jury the affirmative defense that the negligence was that of independent contractors and that the city had no notice of the presence of the dangerous substance on its street. As we have seen, there was no independent contract, and the work, in

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contemplation of law, was being performed by the city through its own employees. The act of leaving the explosives in the street was, therefore, its own act. It must be charged with notice of its own negligence. It follows that there was no error in these instructions.

On the question of contributory negligence, the court instructed as follows:

"You are further instructed that in determining the question whether or not the plaintiff was guilty of contributory negligence to such an extent as to directly and proximately and materially contribute to the injury which he suffered, it is the duty of the jury to take into consideration the boy's age and all of the circumstances surrounding him, his experience or lack of experience, his knowledge or lack of knowledge, the amount of prudence, care and judgment which would ordinarily and reasonably be expected of a boy of that age under the circumstances and conditions shown by the evidence in this case. That is the rule by which the question of whether or not he is guilty of contributory negligence is to be measured by the jury.

"You should not apply to the plaintiff in the case the same rules you would apply to a grown man; you should make allowances for his youth, and in attempting to determine the question of his contributory negligence or the lack of it, inquire whether or not he exercised such care as would reasonably and ordinarily be expected of a boy of his age, intelligence and experience under like circumstances and conditions."

The appellant isolates the phrase which we have italicized and charges grievous error in its use. It is urged that the jury was thereby precluded from taking into consideration the boy's age, experience, knowledge and intelligence. A reading of the phrase in context shows that every one of these elements was included in the same sentence in which it occurs. An instruction identical in thought, though more argumentatively expressed, was approved by this court in the case of *Tibbits v. Spokane*, 64 Wash. 570, 116 Pac. 397. We have so often held that error cannot be successfully pred-

icated upon a detached part of an instruction, not erroneous when taken in context, that citation to the point seems unnecessary. We find no error in the instructions.

III. At the time of the accident, the respondent was only eleven years old. The other two boys were nine and eight respectively. The respondent testified that he did not know what the caps were and did not know that they would explode; that he knew what the dynamite was and also the fuse; that he held the fuse in the cap to avoid burning himself, thinking, as he expressed it, that the fuse would only "fizz"; that when the fuse burned down to the cap, the cap exploded and blew his fingers off. The other two boys testified that they went into the alley so no one would hear the explosion, but both of them thought the fuse would just "fizz." Though the respondent testified that he had never seen dynamite exploded, and one of the other boys testified that he and the respondent had watched the workmen explode a blast, the conflict presented a mere question of credibility for the jury's solution, which, even if solved in favor of the other boy's statement, would not establish, as a matter of law, the respondent's knowledge of the dangerous character of the cap. As said by this court in *Olson v. Gill Home Inv. Co.*, *supra*, in speaking of boys about fourteen years of age:

"In this case it was for the jury to determine whether respondent and the other boys, considering their age, their experience, and their knowledge of right and wrong, were in their acts governed by unreasoning and natural impulses."

Under the evidence here, the question of contributory negligence was clearly one for the jury. *Crabb v. Wilkins*; *Akin v. Bradley Eng. & Mach. Co.*, and *Mathis v. Granger Brick & Tile Co.*, *supra*.

IV. Nor can we say that, as a matter of law, the verdict is excessive. This boy must go through life with a maimed and disfigured hand. The evidence tends to show that he can never use it in skilled labor. The amount may be larger than we would have awarded had we been the jury, but it is

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not so large as to indicate prejudice or other illegal or unworthy motives on the jury's part. We find no warrant for disturbing the judgment. It is affirmed.

MORRIS, C. J., MAIN, FULLERTON, and CROW, JJ., concur.

[No. 12535. *En Banc*. June 9, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. BOWEN
& COMPANY, INCORPORATED, *Appellant*.¹

FACTORS—STATUTES—REGULATION—CONSTITUTIONAL LAW—DUE PROCESS—LIBERTY—POLICE POWERS. The commission merchants' act, Rem. & Bal. Code, §§ 7024-7035, directed against a class of factors or merchants whose principal business is that of selling farm, dairy, orchard and garden products on commission, who are defined as commission merchants and required to procure a license and furnish a bond, is a proper exercise of the police power of the state for the protection of health, safety, morals and welfare and the prevention of fraud, and hence does not violate any of the state or constitutional restrictions with respect to interference with liberty, equality, or the rights of property.

SAME—STATUTES—STRINGENCY OF ACT. The validity of the act is not subject to objection by reason of the stringency and difficulty of its requirements.

SAME—REGULATION—LICENSE. The fact that the main features of the act are the prevention of fraud, does not invalidate the provision requiring a license, since regulation by license is appropriate.

SAME—REGULATION—BONDS. The requirement of a surety company bond in the sum of \$3,000 in order to obtain a license, is not unreasonable and invalid.

STATUTES—PARTIAL INVALIDITY. Upon a prosecution for transacting a commission business without obtaining a license, the unconstitutionality of other provisions of the act cannot be inquired into; since the invalid part may be disregarded where the act is valid in part and separable and capable of execution.

SAME—PARTIAL INVALIDITY. The act is not rendered invalid *in toto* by provisions for imprisonment for debt and recovery of attorney's fees in civil actions upon the bonds; since it may be assumed that the legislature would have enacted the body of the act independently of such questionable provisions.

¹Reported in 149 Pac. 330.

SAME — PARTIAL INVALIDITY — INTERSTATE COMMERCE ACT. The act is not invalid as to commerce carried on wholly within the state because it contravenes the Federal constitution relating to interstate commerce when applied to interstate commerce.

MORRIS, C. J., CHADWICK, FULLERTON, and CROW, JJ., dissenting.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 16, 1914, upon a trial and conviction of violating the commission merchants' law, upon overruling a demurrer to the information. Affirmed.

Bogle, Graves, Merritt & Bogle, for appellant.

John F. Murphy and *H. B. Butler*, for respondent.

HOLCOMB, J.—Appellant was prosecuted in the superior court and convicted of a violation of chapter 139, Laws of 1907, p. 266 (Rem. & Bal. Code, §§ 7024-7035), known as the commission merchants' law, in having carried on the business of commission merchant without first having given bond and procured a license as required by said law. Appellant demurred to the information upon the ground that the act in question is invalid, unconstitutional, and void, for the reasons, (1) that it violates articles 4, 5, and 7, and § 1 of art. 14, of the amendments to the constitution of the United States, and §§ 3, 7, 9, 17, and 21 of art. 1 of the constitution of the state of Washington; and (2) that it is an attempt to regulate interstate commerce. The court overruled the demurrer. At the trial appellant admitted all the allegations of fact contained in the information, and also admitted additional facts not alleged, to wit, that, at the time in question, appellant's principal business was to sell farm, dairy, orchard, and garden products on commission, and that the person from whom he received the produce in question was then a resident of the state of Washington.

Appellant concedes the right of the legislature to pass proper laws reasonably tending to regulate such occupations and businesses as affect the health, safety, comfort, or welfare of the public in general, but insists that the business

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attempted to be regulated by the law in question is a harmless and ordinary business or calling, and that to justify interference by the state with such occupation at least two conditions must clearly appear: (1) that the interests of the public generally, as distinguished from those of a particular class, require such an interference; and (2) that the regulation attempted is reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Appellant's brief, while being very forceful and presenting a painstaking review of the authorities upon the questions involved, follows no set order of presentation, and we shall not attempt to follow any set order.

Great reliance seems to be placed in the holdings of this court in the case of *State ex rel. Richey v. Smith*, 42 Wash. 237, 84 Pac. 851, 114 Am. St. 114, 5 L. R. A. (N. S.) 674, involving the plumbers' licensing law, and *In re Aubrey*, 36 Wash. 308, 78 Pac. 900, 104 Am. St. 952, involving the horseshoers' licensing law. Those cases are very illuminating and correctly state the principles of law applying to the regulation of businesses and callings under the police power of the state. The *Richey* case, as was stated by the court, per Rudkin, J., was where the law obviously attempted to place the control of the plumbing business in the hands of a board to be composed of two master plumbers and one journeyman plumber, who were given power to pass upon the qualifications of other persons desiring to follow that business, and there was no other end in view. The court there said:

"We are satisfied that the act has no such relation to the public health as will sustain it as a police or sanitary measure, and that its interference with the liberty of the citizen brings it in direct conflict with the constitution of the United States."

The same was true of the horseshoers' law, passed upon in the *Aubrey* case. Manifestly there was no relation between

the law there in question and the public health, peace, safety, or general welfare. As a general proposition, the questions of the wisdom, necessity, and policy of the law are for the legislature to determine, and if the legislature proceeds regularly, violating no other constitutional restriction or prohibition, the questions of fact as to the wisdom, necessity, and policy of the law are conclusively determined if a state of facts could exist which would justify the legislation in question. *Munn v. Illinois*, 94 U. S. 118; *Home Tel. & Tel. Co. v. Los Angeles*, 211 U. S. 265; *State ex rel. Beek v. Wagener*, 77 Minn. 483, 80 N. W. 638, 778, 1134, 77 Am. St. 681, 46 L. R. A. 442; *State v. Pitney*, 79 Wash. 608, 140 Pac. 918; *Carstens v. DeSellem*, 82 Wash. 643, 144 Pac. 934. Authorities could be multiplied to the same effect, but it is needless.

We may also give assent to the main proposition advanced by appellant, that the enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or business and of acquiring, holding, and selling property, subject only to its civil liability for debt or damages and the right to contract in respect thereto, is an essential part of its rights of liberty and property, as guaranteed by the fourteenth amendment to the Federal and the corresponding provisions of our state constitution. But the Federal and state constitutional limitations were not designed to interfere with the exercise of the police power of the state for the protection of health, safety, morals, and welfare, and the prevention of fraud. The power which the legislature has to promote the general welfare is very great, and the discretion which it has and may exercise in the employment of means to that end is very large. True, it is not all powerful, while both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property, to the end that no man may be compelled to hold his life or the means of living or any ma-

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terial right essential to the enjoyment of life, at the mere will of another,

“and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage.” *Yick Wo v. Hopkins*, 118 U. S. 356, 370.

The precise bounds of the police power have never been prescribed, nor will the courts attempt to define and prescribe its limitations rigidly. *Commonwealth v. Alger*, 7 Cush. 53; *State v. McFarland*, 60 Wash. 98, 110 Pac. 792, 140 Am. St. 909; *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; *State v. Somerville*, 67 Wash. 638, 122 Pac. 324; *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913 D. 78; *State v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645; *State v. Pitney*, 79 Wash. 608, 140 Pac. 918; *Carstens v. DeSelle*m, *supra*.

Every possible presumption is in favor of the validity of the statute until the contrary is shown beyond a reasonable doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule. *Sinking-Fund Cases*, 99 U. S. 700; *Livingston v. Darlington*, 101 U. S. 407; *Powell v. Pennsylvania*, 127 U. S. 678; *State v. Carey*, 4 Wash. 424, 30 Pac. 729.

As to the exercise of the police power, it suffices in general to say that the courts will arrest the execution of the statute when it manifestly conflicts with the constitution, either state or Federal; but the courts cannot run a race of opinion upon points of right, reason, and expediency with the law-making power. Cooley, *Constitutional Limitations* (7th ed.), 236.

“It is true that equality of rights, privileges, and capacities should be the aim of the law, and if . . . special burdens or restrictions are imposed in any case it must be

presumed that the legislature designed to depart as little as possible from fundamental maxims of government." Cooley, *Constitutional Limitations* (7th ed.), 562.

The particular business here sought to be regulated is, of course, a legitimate and, in many respects, a necessary and important business. The business of producing farm, garden, orchard, and dairy products is one of the most important industries of the state. The producer cannot ordinarily be both producer and marketer. The legislature seems to have found that there exists a class of factors or merchants whose principal business is that of selling such produce on commission, and that certain abuses have grown up in that business; so, to provide regulation and prevent such abuses, the act in question was passed. Such an act, similar in most of the provisions, was sustained in Minnesota, in *State ex rel. Beek v. Wagener, supra*, and a similar act was also sustained in Illinois, in *Lasher v. People*, 183 Ill. 226, 55 N. E. 663, 75 Am. St. 103, 47 L. R. A. 802. A similar act in Michigan was held bad, in *People ex rel. Valentine v. Coolidge*, 124 Mich. 664, 83 N. W. 594, 83 Am. St. 352, 50 L. R. A. 493. Bringing to aid the presumptions in favor of the legislative power, and, also, the presumption that a state of facts exists which would warrant the selection of the persons or classes which this law hits, we believe that the reasoning in the Minnesota and Illinois cases is convincing.

"This objection to the law is not valid. The legislature has power to form classes for the purpose of police regulation, if they do not arbitrarily discriminate between persons in substantially the same situation. A discrimination must rest upon some reasonable ground of difference, but the classification in this case is a natural one. The commission merchants dealing in the kinds of produce named in this act, which constitute the small products of the farm, are of a different class from those who transact business in the great markets for the sale of grain, live stock and dressed meats." *Lasher v. People, supra*.

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See, also, *McKnight v. Hodge*, 55 Wash. 289, 104 Pac. 504, 40 L. R. A. (N. S.) 1207, and cases there cited.

The law appears to be a very stringent and in some respects even drastic one, but the validity of a statute is not subject to objection because of the stringency or difficulty of its requirements. *Dent v. West Virginia*, 129 U. S. 114.

"It is not for the court to say that a constitutional law shall not have effect, because it is in the judgment of a court unreasonable." *Barton v. McWhinney*, 85 Ind. 481.

See, also, *People v. Worden Grocer Co.*, 118 Mich. 604, 77 N. W. 315; *Hamilton v. St. Louis County Court*, 15 Mo. 3; *State ex rel. Ornstine v. Cary*, 126 Wis. 135, 105 N. W. 792, 11 L. R. A. (N. S.) 174; *Point Roberts Fishing Co. v. George & Barker Co.*, 28 Wash. 200, 68 Pac. 438.

Nor does that part of the law requiring a license render the act void.

"The most proper business may be regulated to prevent its becoming offensive to the public sense of decency or for any other reason injurious or dangerous, and rules for the conduct of the most necessary and common occupations are prescribed when from their nature they afford peculiar opportunities for imposition and fraud." Cooley, *Constitutional Limitations* (7th ed.), 886.

See, also, 8 Cyc. 1067; 25 Cyc. 614.

The fact that this law in the main provides for prevention of fraud upon the customer of the commission merchant, assuming that the legislature found a state of facts requiring such regulations to prevent such fraud, renders the regulation by licensing, among other features, appropriate. The license fee here is small, not in any way oppressive or unreasonable, and for any revocation or threatened revocation of the license by the licensing authority, without just cause, relief is to be afforded by the courts.

Appellant insists that the requirement of the law, in order to obtain a license, that a surety company bond in the sum of \$3,000 be furnished, is an unreasonable and invalid re-

quirement. It insists also that it is impossible of performance. The last contention is undoubtedly merely a conclusion or statement of opinion. We have heretofore held, in the case of *Ferguson-Hendrix Co. v. Fidelity & Deposit Co.*, 79 Wash. 528, 140 Pac. 700, that the provision of the law requiring such bond in order to obtain a license is a valid exercise of the police power of the state. It is urged, however, that that question was not involved and was not proper to be decided in that case. *State ex rel. McKell v. Robins*, 71 Ohio St. 273, 73 N. E. 470, 69 L. R. A. 427, where a similar statute in Ohio was not sustained, is cited in support of appellant's contention. We cannot give our assent to the reasoning or the conclusion in that case; and while it may be true that the validity of this section of the law was not involved in the *Ferguson-Hendrix* case, *supra*, yet we adopt the reasoning in that case as supporting this provision of the law.

The appellant urges the unconstitutionality of the other provisions of the law to render the entire act void. We conceive it to be the unquestioned rule that a person cannot invoke a constitutional objection to a part of a statute not applicable to his own particular case. *Southern R. Co. v. King*, 217 U. S. 524; *Engel v. O'Malley*, 219 U. S. 128; *Standard Stock Food Co. v. Wright*, 225 U. S. 540; *Rosenthal v. People of New York*, 226 U. S. 260; *Darnell v. Indiana*, 226 U. S. 390; *Cram v. Chicago, B. & Q. R. Co.*, 85 Neb. 586, 123 N. W. 1045, 26 L. R. A. (N. S.) 1028; *Wadin v. Czuczka* (Ariz.), 146 Pac. 491. Unless a person's rights are directly involved, courts will postpone inquiry into constitutional questions which are separable therefrom until they are met upon a question directly at issue, unless the unconstitutional feature of it, if it exists, is of such a character as to render the entire act void. *New York Cent. & H. R. R. Co. v. United States*, 212 U. S. 481; *People v. Huff*, 249 Ill. 164, 94 N. E. 61; *Hammer v. State*, 173 Ind. 199, 89 N. E. 850, 140 Am. St. 248, 24 L. R. A. (N. S.) 795; *Wadin v. Czuczka*,

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supra. But that a law may be valid in part and separable and capable of being executed, so that the invalid part may be disregarded, is a well settled principle of statutory construction. Lewis' Sutherland, Statutory Construction, 578, 579; Cooley, Constitutional Limitations (7th ed.), 246, 247; *Pullman State Bank v. Manring*, 18 Wash. 250, 51 Pac. 464; *Supervisors v. Stanley*, 105 U. S. 305.

The provisions in some sections of the act, for imprisonment for debt and for recovery of attorney's fees in suits upon the bonds provided for in the act, are matters not involved in this prosecution, and with which the appellant has no concern. We may well assume that the legislature would have enacted the body of the act providing for licensing and regulation of commission merchants regardless of the provisions for recovery of attorney's fees in civil actions upon the bonds and for prosecution and punishment for violation of *any* of the sections of the act. We, therefore, hold that, as to those sections, whether they are or are not unconstitutional and void, the provisions, so far as involved in this prosecution, are entirely independent and separable therefrom; and if said sections should be determined to be unconstitutional and void, such determination and the elimination of such provisions would not affect the remainder of the act.

The same reasoning applies to the contention of the appellant that the law contravenes the provisions of the Federal constitution relating to interstate commerce. So far as the present case is concerned, there is no issue involving rights under the interstate commerce clause of the Federal constitution. However, the question whether a statute applies to interstate commerce depends upon the actual operation; and a statute which is void as to interstate commerce may be valid as regards commerce which is carried on wholly within the state. 21 Am. & Eng. Ency. Law (2d ed.), 792; *State ex rel. Beck v. Wagener*, *supra*.

Other matters are discussed by appellant which are not involved in the prosecution and are not, in our opinion, to be

passed upon in this case. We cannot say that the act, so far as it applies to the facts upon which appellant was prosecuted, is palpably in violation of any of the provisions referred to in the Federal or state constitution.

The judgment is therefore affirmed.

PARKER, MOUNT, MAIN, and ELLIS, JJ., concur.

CHADWICK, J. (dissenting).—No one can take exception to the abstract propositions stated in the majority opinion. They require no citation of authority. Granting that the *Ferguson-Hendrix Co.* case was correctly decided, the real question in this case was not even discussed in that opinion. The *Ferguson-Hendrix Co.* case decided nothing more than that the provision of the commission merchant law requiring a surety bond was constitutional. It did not assume to pass upon other provisions of the law.

The power of the state to pass laws to preserve the peace, to protect the health and safety of the citizen, and promote his welfare is axiomatic. That such laws must be general in their application is admitted. It does not follow that, in the application of its power, the state cannot make classes. But it is equally true that the state cannot make classes or a class within a class, unless the class to which the law is made to apply and the distinction drawn bears some reasonable relation to the evil sought to be cured. In this case the evil sought to be remedied is the impositions practiced upon the producers of farm and dairy products who live at a distance from the market places and who are, perforce of that circumstance, compelled to trust their commodities to those who sell their goods on commission.

Granting that it is within the power, as is held by the majority and as I admit, of the state to provide that all commission merchants must take out a license and must give a bond, and make the report required by the statute and subject their books to the inspection of all who are interested, the real point in this case is not whether that can be

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done, but whether the legislature can say that it shall be done by some commission merchants and not by others.

Section 16 of the act defines commission merchants. It says that commission merchants within the meaning of this act are those whose *principal* business is dealing in farm and dairy products. Unless we can find some reason for the distinction between those who are doing some of their business with the farmers and dairymen and those who are doing the principal part of their business with farmers and dairymen, the law cannot be sustained. What is the test? A reference to the evil and the proposed remedy. Under the law, a man or firm who is doing a \$100,000 business, \$40,000 being with goods consigned from farmers and dairymen, and \$60,000 in flouring mill products, commercial food stuffs and fruits from foreign shipments, would clearly be exempt because the principal part of his business is not with farmers and dairymen. On the other hand, if a firm does a business of \$10,000, all or the major part of which is with the farmers and dairymen upon consigned goods, he is subject to the law because it is the principal part of his business. If a grower ships a ton of potatoes to the man who does the \$100,000 business, his farm consignments being the smaller part of the business, and at the same time ships a ton of potatoes to the man who does the \$10,000 business, it being all with the farmers and dairymen, can it be said that there is any reasonable ground upon which to rest the distinction made by the law? Is not the farmer just as liable to imposition from the man who is doing the lesser part of his business in farm and dairy products as he is from the man who is doing the greater part? It follows that no reasonable ground for the distinction can be drawn.

This principle was noticed and adhered to by this court in the Spokane employment agency case, *Spokane v. Macho*, 51 Wash. 322, 98 Pac. 755, 130 Am. St. 1100, 21 L. R. A. (N. S.) 263. We there said:

"When exercising its power to regulate a business, the municipality may classify subjects of legislation, but the law must treat alike all of a class to which it applies, and must bring within its classification all who are similarly situated or under the same condition."

We also quoted from the case of *State v. Sheriff of Ramsey County*, 48 Minn. 236, 51 N. W. 112, 31 Am. St. 650:

"The classification must be based on some reason suggested by a difference in the situation and the circumstances of the subjects treated, and no arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar."

We also quoted the principle from the case of *Tugman v. Chicago*, 78 Ill. 405:

"An ordinance which would make the act done by one penal and impose no penalty for the same act done under like circumstances by another, could not be sanctioned or sustained because it would be unjust and unlawful."

Other cases and McQuillin, Municipal Ordinances, 193, were cited to sustain our opinion. Under this case and all the elementary rules of law, the distinction made by the statute must be sustained by the *character* of the act and not by the extent of the act, or the *amount* of business done by those against whom the law is directed. Indeed, this case is an aggravated violation of the rule, for the one who does a lesser part of his business with the farmer and dairyman may in fact be the worst offender.

The *Macho* case was followed in *Seattle v. Dencker*, 58 Wash. 501, 108 Pac. 1086, 137 Am. St. 1076, 28 L. R. A. (N. S.) 446, and *State v. Robinson Co.*, 84 Wash. 246, 146 Pac. 628. See, also, *State v. McFarland*, 60 Wash. 98, 110 Pac. 792, 140 Am. St. 909. It is possible that a law providing that all commission merchants having transactions with farmers and dairymen exceeding in amount a certain sum could be sustained as a proper classification, but to hold that the aggregate amount of business done with the farmer and

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dairyman is a basis of classification cannot be sustained by reason or authority. They might just as well say that dry goods merchants dealing with farmers and dairymen should give a bond as a precaution and remedy against imposition and that hardware merchants should not.

"A much worse discrimination would be a discrimination between citizens of the same class engaged in the same business, where there is no reason suggested by the difference in the situation and circumstances of the subjects treated; for not only is the business in this case similar and identical, but it is purely and simply a difference in the mode of transacting the business [amount of business], a mode which cannot possibly affect any principle or affect deleteriously the consumer or purchaser of the article sold." *Seattle v. Dencker, supra*.

Neither can it be said that § 16 of the act can be held to be unconstitutional and the rest of the act remain. Section 16 is the very cap-stone of the arch. Without it there could be no law, for the legislature in that section says who are and who are not commission merchants within the meaning of the statute. Following the rule and construction laid down by us in the stock food case, *State v. Robinson Co., supra*, and by all courts when a similar question has been presented, we must presume that the law would not have been passed unless a section had been included exempting a certain class within a class. Otherwise no reference would have been made to the character and amount of business done. The law would have been complete without it. Answering a similar contention made in the stock food case, we said:

"The Attorney General further argues that, if § 13 (*Id.*, § 6022) is void, it may be excluded from the act, and the balance of the act may still remain a valid law. But it is apparent that § 13 (*Id.*, § 6022) is a material part of the act. It is more than probable that if this section had not been inserted the act would not have passed. It was inserted for the purpose of excluding cereal and flouring mills from the operation of the act. To say that this section is

unconstitutional and does not affect the remainder of the act is to say that every person, firm or corporation is bound to comply with the terms of the act, when the legislature itself has said that cereal and flouring mills are not bound by the act. In short, to hold this section void and the rest of the act valid is to determine, in face of an express statement of the legislature to the contrary, that the act applies to all persons dealing in concentrated commercial feeding stuffs."

The statutes in Wisconsin, Illinois and Minnesota are not the same as ours. They do not make a class within a class. The statutes in each of those states cover "every," "any" and "all" "persons, firms and corporations" dealing in farm products on commission. Undoubtedly the power to classify all who are so engaged is within the power of the legislature. In *State ex rel. Beek v. Wagener*, 77 Minn. 483, 80 N. W. 633, 778, 1184, 77 Am. St. 681, 46 L. R. A. 442, the court, after finding that a law controlling commission merchants was constitutional, noted some of the abuses calling for the law, and of the sale of farm products, said:

"And, with respect to other agricultural products and farm produce, it is to be observed that they are largely of a perishable nature, and subject to rapid deterioration in transit, or after reaching the consignee. This fact gives to the latter an opportunity to falsify his report of a sale to the distant consignor, and to insist that the article consigned had become more or less unmarketable before sale could be made; and here, as in the case of grain, the latter has little or no opportunity to ascertain the truth. Without wishing to intimate that fraud of this nature had actually become so prevalent as to justify the accusation made, we do say that a majority of the people in this state had become convinced of the truth of these charges, and in great numbers besieged the legislature in behalf of the suppression of the alleged evil practices. This was a matter of common knowledge. It was publicly believed that the business of selling agricultural products and farm produce on commission had become saturated with false and fraudulent methods, to the great injury of a large class of our citizens, who were compelled to deal with commission men, and who were powerless to detect

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or prevent the wrong, and that the business had thus become sufficiently affected with public interests as to be the proper subject of police regulation."

The principle of the law is right, but it cannot be sustained under an act making the things complained of penal in one class and not in another. It seems to me that a joker was deliberately slipped into the law.

For these reasons, I dissent.

MORRIS, C. J., FULLERTON, and CROW, JJ., concur with CHADWICK, J.

[No. 12259. Department One. June 10, 1915.]

JOHN BURKE *et al.*, by their Guardian *ad litem*, Bertie Burke,
Respondents, v. NORTHERN PACIFIC RAILWAY
COMPANY, Appellant.¹

INFANTS—JUDGMENTS—CONCLUSIVENESS—VACATION—FRAUD. A consent judgment, after a hearing on evidence, compromising a suit on behalf of minors, duly represented by guardian *ad litem*, will not be set aside for constructive fraud, in that a known material witness was not produced by the guardian; since there is no distinction between decrees in favor of adults and infants duly represented, and fraud to set aside a judgment must be actual and positive, and clearly and satisfactorily proved.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 18, 1914, upon findings in favor of the plaintiffs, in an action to vacate a judgment, tried to the court. Reversed.

Cannon, Ferris & Swan, for appellant.

A. O. Colburn and Luby & Pearson, for respondents.

MORRIS, C. J.—This is the same case reported in 80 Wash. 188, 141 Pac. 364, wherein a motion to dismiss the appeal was denied; the appeal being from an order setting aside the first judgment. But little need be added to the statement

¹Reported in 149 Pac. 335.

of facts contained in the first opinion for a proper understanding of the questions upon which this appeal hinges. The lower court found that the amount to be paid having been agreed upon, Mrs. Burke, accompanied by her attorney and the attorney for the railroad company, appeared before the court in the department of Kennan, J., and made a statement to the court touching the controversy. The record shows, in addition to this finding, that Mrs. Burke was called to the stand and interrogated by the court as to her knowledge of the facts upon which the action was based, her attitude towards the proposed settlement, and her judgment as to whether or not it conserved the best interests of the minor children; and the court, upon hearing the statements and evidence of Mrs. Burke, made findings and entered judgment. The proceeding to vacate the judgment so entered was had before Huneke, J., and the finding upon which the conclusion of constructive fraud was made is that,

"The attention of the court was not called to all the facts pertaining to the matter, in that one Frank Weston, who was personally present and conversant with the facts involved in the accident resulting in and causing the death of said Edward Burke, was not produced, nor were such facts otherwise called to the attention of the court, though the knowledge of such witness as to these facts was well known to the said Bertie Burke and her attorney, and though the presence and testimony of said witness could have been readily secured and that the testimony of said witness, had it been produced, would have substantially supported the allegations of the complaint and established *prima facie* negligence on the part of the defendant contributing to the injury and death of said Edward Burke, and was material to the issue of compromise, and should have been produced."

Weston was produced at this hearing and testified to facts within his knowledge. It appears that, at the time of the accident, he was upon the platform of the caboose with a brakeman named Brown. This fact was known to Mrs. Burke at the time of the hearing upon the settlement, and she testified she indicated the fact to her attorney. Weston

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now testifies that, shortly after the accident, he called upon the attorney for Mrs. Burke and indicated to him the facts concerning the accident within his knowledge. The brakeman, Brown, had also called at the office of Mrs. Burke's attorney, who obtained from him a statement of the facts within his knowledge. This statement is now produced. It does not differ materially from the facts testified to by Weston, so that it is clear, at the time of the settlement, that Mrs. Burke and her attorney knew all of the facts concerning the accident in so far as Brown and Weston could relate them.

Brushing aside a number of technical errors suggested by appellant, such as that the parties in this action are not the same as those in which the judgment was entered, that all the parties in the former action are not made parties in this action, the statute of limitations and other so-called infirmities, we will determine whether or not these facts support the judgment. It may be said, first, that, in the absence of fraud or collusion, minors properly in court are bound as fully as persons of full age, and when properly represented, are bound by the knowledge of those who represent them. The law recognizes no distinction between a decree in favor of or against infants and a decree to which adults only are parties. The same invalidating vice must be found in the one case as in the other. *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671; *English v. Savage*, 5 Ore. 518; *Savage v. McCorkle*, 17 Ore. 42, 21 Pac. 444; *Harrison v. Wallton's Ex'r.*, 95 Va. 721, 30 S. E. 372, 64 Am. St. 330, 41 L. R. A. 703; *Johnson v. Johnson*, 38 Tex. Civ. App. 385, 35 S. W. 1023; 1 Daniel, Chancery Practice, § 164.

Speaking to this point, it is said in *Thompson v. Maxwell Land Grant & R. Co.*, 168 U. S. 451:

"It would be strange, indeed, if, when those authorized to represent minors, acting in good faith, make a settlement of claims in their behalf, and such settlement is submitted to the

proper tribunal, and after examination by that tribunal is found to be advantageous to the minors and approved by a decree entered of record, such settlement and decree can thereafter be set aside and held for naught on the ground that subsequent disclosures and changed conditions make it obvious that the settlement was not in fact for the interests of the minors, and that it would have been better for them to have retained rather than compromised their claims. If such a rule ever comes to be recognized, it will work injury rather than benefit to the interests of minors, for no one will make any settlement of such claims for fear that it may thereafter be repudiated. The best interests of minors require that things that are done in their behalf, honestly, fairly, upon proper investigation and with the approval of the appropriate tribunal, shall be held as binding upon them as similar actions taken by adults."

No question is raised but that the infants were properly in court in the suit in which this judgment was entered. Our practice provides for the appointment of a guardian *ad litem* to represent infant parties, and when so appointed, the infant is properly in court for all purposes, and the same procedure is applicable in such cases as in cases where all parties are of full age. *State ex rel. Lane v. Ballinger*, 41 Wash. 23, 82 Pac. 1018, 3 L. R. A. (N. S.) 72.

The lower court has only found constructive fraud based upon the failure of the guardian *ad litem* to produce the witness Weston. This does not seem to us sufficient to vacate the judgment. Fraud which will justify the setting aside of judgments and decrees must be actual and positive, and not merely constructive, and the proof relied upon must be clear and satisfactory to successfully assail judgments regularly entered. It must be something more than a suspicion. *Wilson v. Hubbard*, 39 Wash. 671, 82 Pac. 154; *Meeker v. Mettler*, 50 Wash. 473, 97 Pac. 507; *Ross v. Wood*, 70 N. Y. 8; *Markell v. Hill*, 64 App. Div. 191, 69 N. Y. Supp. 537, 71 N. Y. Supp. 924; *Ward v. Southfield*, 102 N. Y. 287, 6 N. E. 660; *Lieber v. Lieber*, 239 Mo. 1, 143 S. W.

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458; *Nichols v. Stevens*, 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. 514; *Ohio & W. Mortgage & Trust Co. v. Carter*, 9 Kan. App. 621, 58 Pac. 1040; *McDonald v. Pearson*, 14 Ala. 630, 21 South. 534; *United States v. Throckmorton*, 98 U. S. 61; *Parham v. Burns*, 135 App. Div. 884, 120 N. Y. Supp. 142; *McElroy v. Board of Education*, 158 App. Div. 219, 142 N. Y. Supp. 1090; *Belle v. Brown*, 37 Ore. 588, 61 Pac. 1024; 1 Bigelow, Fraud, pp. 87, 88.

The failure of the guardian *ad litem* to produce a known witness is not such fraud as will justify vacating a judgment in favor of herself and the minors when it appears, as this record shows, that the judgment was granted upon a hearing, the guardian *ad litem* sworn and examined by the court, and the court advised of the facts and circumstances before entering judgment. Cases are numerous where compromise settlements in behalf of minors have been set aside where such settlements have been made by parents, next friends, and guardians *ad litem*. The reasoning generally advanced for such a rule is that the persons assuming to effect the compromise had no power without authority of court to compromise or settle any cause of action in favor of the infant, or some flaw has been found which convinced the court that the infants were not properly represented. No such flaw appears in this case. The guardian *ad litem* was regularly appointed; a reputable attorney was employed to investigate the accident and wage action against the railway company; the settlement agreed upon was submitted to the court, with the statement of the circumstances giving rise to the controversy; the court made inquiry into the facts, examined witnesses, and after such a hearing, made findings to the effect that the best interests of the minors was conserved by the compromise, and entered a regular judgment. Under such circumstances the better reasoning supports the finality of the judgment. *Tripp v. Gifford*, 155 Mass. 108, 29 N. E. 208, 31 Am. St. 530; *Missouri Pac. R. Co. v. Lasca*, 79 Kan. 311, 99 Pac. 616, 21 L. R. A. (N. S.) 338.

While Judge Kennan, who entered this judgment, had no special recollection of the proceedings before him, he testified fully as to the course always pursued by him in entering judgments of this character, and as to the inquiry made in order to satisfy himself that the proposed settlement was for the best interests of the minors. As is said in *Thompson v. Maxwell Land Grant & R. Co.*, *supra*:

“Ordinarily, indeed, a court before entering a consent decree will inquire whether the terms of it are for the interests of the infants. It ought in all such cases to make the inquiry, and because it is its duty so to do it will be presumed in the absence of any showing to the contrary, that it has performed its duty. . . . The consent decree shows fully the terms of the settlement, and it certainly is not straining the presumption in favor of judicial action to assume that the court would not have permitted the entry of this decree providing for a settlement whose terms were thus disclosed, without being satisfied that such settlement was for the interest of the minors who were under its charge.”

The judgment is reversed, and remanded with instructions to dismiss the petition.

HOLCOMB, MOUNT, CHADWICK, and PARKER, JJ., concur.

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Opinion Per FULLERTON, J.

[No. 11987. Department Two. June 12, 1915.]

BENJAMIN H. SAVAGE, *Appellant*, v. SAMUEL A. ASH *et al.*,
Respondents.¹

TAXATION—TAX DEED—CANCELLATION—FRAUD—ACTIONS—LIMITATIONS. Rem. & Bal. Code, § 159, authorizing an action for relief upon the ground of fraud at any time within three years after the discovery of the facts constituting the fraud, is superseded, as to actions to set aside or cancel a tax deed for fraud, by the later act, Id., § 162, providing that actions to cancel a tax deed or recover lands sold for taxes, must be brought within three years from the date of the issuance of the tax deed.

ACCOUNT—COMPLAINT—SUFFICIENCY. In an action to cancel a tax deed, an allegation to the effect that one of the defendants violated confidential relations and promised to bid in the property prior to sale, afterwards representing that he had done so, is insufficient to state a cause of action for an accounting against such individual defendant, upon a general demurrer to the complaint.

Appeal from a judgment of the superior court for Walla Walla county, Miller, J., entered September 20, 1913, in favor of the defendants, upon sustaining a demurrer to the complaint, dismissing an action to set aside a tax deed. Affirmed.

Geo. T. Thompson and *John F. Watson* (*Thos. H. Brents*, of counsel), for appellant.

T. P. & C. C. Gose and *Pedigo & Smith*, for respondents.

FULLERTON, J.—The appellant, Benjamin H. Savage, in the year 1893, on the death of his father, became seized in fee, as a tenant in common with his mother, of certain real property situated in Walla Walla county. Subsequently the taxes on the land were suffered to become delinquent, and on November 18, 1907, the county treasurer of Walla Walla county issued to one Ash a certificate of delinquency against the lands for the unpaid and delinquent taxes levied and assessed thereon for the fiscal year of 1902; Ash paying, at the

¹Reported in 149 Pac. 325.

time of receiving the certificate, all of the unpaid and delinquent taxes with penalties and interest then accrued against the property. On December 11, 1907, Ash commenced an action to foreclose the certificate of delinquency, obtaining a decree of foreclosure and order of sale of the premises on March 30, 1908. The premises were sold under the decree on April 11, 1908, to The Watertown Company, and a treasurer's deed of the premises was issued to the purchaser on the same day. Subsequently The Watertown Company conveyed the land to one Barker, who in turn conveyed it to the Attalia Land Company, which company now holds such title to the property as was derived by the sale under the tax foreclosure proceedings. The service of summons in the foreclosure proceeding was made by publication, and was based upon an affidavit of the attorney for Ash, which (omitting the formal parts) reads as follows:

"John H. McDonald being first duly sworn on oath says: That I am one of the attorneys for the plaintiff in the above entitled action and make this verification for and on behalf of said plaintiff; that I believe the above named defendant, Benjamin Savage, is not a resident of the state of Washington, and cannot be found therein; that the post office address of the said defendant is to me unknown; that the subject of this action is real property in the state of Washington, and the defendant has or claims an interest therein; that this action is brought to foreclose a delinquent tax certificate on real property in the state of Washington."

At the time the appellant became seized of his interest in the land on the death of his father, he was a minor of about the age of four years, and was a minor at the time the foreclosure proceedings were commenced, and continued so to be until March 20, 1908, some ten days prior to the entry of the decree of foreclosure.

The present action was instituted on March 18, 1913, to set aside and cancel the treasurer's deed and to recover the land from the present holder. As grounds for recovery, the appellant, after alleging the facts hereinbefore recited, fur-

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ther alleged that, at the time of the commencement of the foreclosure proceedings and up to the time he reached the age of majority, he was "absent from this state, living at Grinnell, in the state of Iowa, which place was his post office address, as was well known to the defendant Ash at all times, and had no notice or knowledge of the" pendency of the foreclosure proceedings; further alleging that Ash was guilty of fraud in procuring the service of the summons, in that he concealed his knowledge of the post office address of the appellant, and procured his attorney to make affidavit that the appellant's post office address was unknown, in order that he might avoid giving the appellant actual notice of the pendency of the proceedings, and that appellant did not discover the fraud until shortly before commencing his action.

To the complaint, the respondents interposed a demurrer, based on the grounds that it did not state facts sufficient to constitute a cause of action, and was not commenced within the time limited by law. The demurrer was sustained by the trial court. This appeal is taken from a judgment of dismissal with costs, entered after the appellant had elected to stand on his complaint.

From the dates given, it will be observed that the action was not commenced until nearly five years after the issuance of the treasurer's deed, and it was the opinion of the trial court that the action was barred by § 162 of the code (Rem. & Bal.) which provides that "Actions to set aside or cancel the deed of any county treasurer issued after and upon the sale of lands for . . . taxes, or for the recovery of land sold for delinquent taxes, must be brought within three years from and after the date of the issuance of such treasurer's deed." It is the appellant's contention that the action is one for relief on the ground of fraud, and can be maintained, in virtue of the fourth subdivision of § 159 of the code (Id.), at any time within three years after the discovery by the aggrieved party of the facts constituting the fraud.

In *Fleming v. Stearns*, 66 Wash. 655, 120 Pac. 522, we held that an action to set aside and cancel a tax deed and to recover real property sold for delinquent taxes must be brought within three years after the issuance of the treasurer's deed, regardless of the ground upon which the attack on the sale is made; holding, in substance, that the statute relied upon by the appellant was superseded by the later statute with regard to its effect upon actions of this character. The appellant attacks the case on two grounds, first, that the particular holding was not necessary to a decision of the case, and, second, that the holding is wrong in principle. But with neither of these contentions are we able to agree. It may be that the case could have been rested on the first ground suggested in the opinion, namely, that the fraud alleged was not proven, but both questions were clearly in the case, and simply because the court decided both, does not necessarily mean that the one or the other is dictum.

On the second branch of the objection, it will not be disputed that the legislature has power to limit the time within which actions may be commenced where fraud enters into the transaction, and this regardless of the question whether the fraud is discovered or discoverable within the statutory period. The question is never one of power but always one of intent, and here the question is, did the legislature intend the statute under consideration to bar all actions brought for the purposes mentioned unless brought within three years. On its face it so indicates. It contains no exceptions whatsoever. It was enacted long after the enactment of the section on which the appellant relies, and, in so far as a conflict exists between the two, must be read as superseding that section. It is in aid of the taxing power. Speedy and prompt payment of taxes are necessary to an economical administration of the state's affairs, and to secure this the law provides that, if the owner will not pay the taxes levied upon his property, another may pay them for him and have a lien on the property for the amount paid, which he can enforce

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as other liens are enforced. But tax titles, seemingly, especially in the earlier periods of our history, did not meet with favor from the courts; indeed, with such little regard were such titles held that the phrase "worthless as a tax title" was proverbial, and no one but those of a speculative turn would deal with property under such titles, and those only in cases where the chances of gain were large and the amount risked proportionately small. The purpose of statutes like the present is to make such titles desirable as investments by making them more secure, and we think the manifest purpose of the present statute was to fix a time beyond which a tax foreclosure proceeding cannot be questioned for any cause whatsoever.

The complaint contained an allegation to the effect that one of the defendants was president of the corporation which purchased the property at the tax foreclosure sale, was the brother of appellant's mother, and sustained confidential relations with her and the appellant, having in charge, in a large measure, her business interests, and that he promised the appellant's mother, prior to the sale, that he would bid in the property for her and the appellant, and afterwards represented that he had done so and was holding the legal title in trust for them. It is claimed that this allegation states a cause of action for an accounting against the particular defendant, and that the court erred in sustaining the demurrer for that reason. But conceding the rule to be that the demurrer is not to be sustained if the facts stated entitled the pleader to some relief, although not the relief demanded in the prayer of the complaint, we cannot think this allegation sufficient to bring the appellant within the rule. There was a general demurrer interposed to the complaint, and we think this allegation too meager to state a cause of action, either in damages or for accounting as against such a demurrer.

The judgment is affirmed.

MORRIS, C. J., CROW, and PARKER, JJ., concur.

[No. 12817. Department Two. June 12, 1915.]

THE STATE OF WASHINGTON, *on the Relation of the
Prosecuting Attorney of Spokane County, Respondent,*
v. UNION SAVINGS BANK OF SPOKANE, *Appellant.*¹

APPEAL—DECISIONS APPEALABLE—FINAL ORDERS—MANDAMUS. An order in mandamus proceedings by a citizen and taxpayer compelling the prosecuting attorney to institute *quo warranto* proceedings against a corporation, is a final order in the proceeding against the prosecuting attorney, and hence is appealable by him under the express provisions of Rem. & Bal. Code, § 1033.

Motion to dismiss an appeal from an order of the superior court for Spokane county, Kennan, J., entered April 5, 1915, directing the institution of proceedings in the nature of *quo warranto*. Denied.

Danson, Williams & Danson and Clyde H. Belknap (George D. Lantz, of counsel), for appellant.

Hamblen & Gilbert and Smith & Mack, for respondent.

FULLERTON, J.—W. S. Gilbert, a citizen and taxpayer of the county of Spokane, filed a petition in the superior court of that county praying for an order against the prosecuting attorney of Spokane county, directing that officer to institute, in his official capacity, the necessary proceedings to inquire by what authority the Union Savings Bank, a corporation, organized under the laws of this state, was exercising, or was about to exercise, the functions of a banking corporation. On the filing of the petition, the court made an order requiring the prosecuting attorney to appear before it on a day named and show cause, if any he had, why he should not institute the proceedings prayed for in the petition; directing, at the same time, that a copy of the order, together with a

¹Reported in 149 Pac. 827.

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copy of the petition, be forthwith served upon the prosecuting attorney. On the day named in the order, the prosecuting attorney appeared and made answer to the petition, setting out the reasons why he had refused to institute the proceedings requested. The court, after a hearing had thereon, adjudged the answer insufficient, and entered an order directing the prosecuting attorney to institute proceedings in the nature of *quo warranto* against the corporation, substantially as prayed for in the petition. From this order, the prosecuting attorney appealed.

This is a motion to dismiss the appeal. It is contended that the order is not final; that it is but a step in the proceeding of *quo warranto* instituted to inquire into the conduct of the corporation named.

But while the applicant has entitled his proceeding as if it were a proceeding instituted by the prosecuting attorney against the Union Savings Bank, it is plain that it is not such a proceeding. The only person authorized to institute such a proceeding is the prosecuting attorney, and that officer not only has not instituted such a proceeding, but has refused, and is now refusing, to institute it. This proceeding is, therefore, in no sense a proceeding against the bank. On the contrary, it is a proceeding, instituted by a person representing the interest of the public, to compel the prosecuting attorney to perform a service such person conceives it to be the duty of the prosecuting attorney to perform. It is a contest between the applicant and the prosecuting attorney, in which the applicant is the relator and the prosecuting attorney the defendant, and was terminated finally by the order of the court directing that *quo warranto* proceedings be instituted. In substance and effect, the proceeding is one to compel the performance of an act which it is alleged the law especially enjoins upon the prosecuting attorney as a duty resulting from his office; in other words, it is a proceeding in *mandamus*.

Being a proceeding in mandamus, and being concluded by the final order entered therein, it is appealable by the express provision of Rem. & Bal. Code, § 1033 (P. C. 81 § 1793).

The motion to dismiss is denied.

MORRIS, C. J., MAIN, ELLIS, and PARKER, JJ., concur.

[No. 12105. Department Two. June 12, 1915.]

FLORENCE MURPHY WILLSON, *Respondent*, v. HERBERT E. WILLSON, *Appellant*.¹

APPEAL—DECISION—JUDGMENT AGAINST SURETIES — BOND—SUPERSEDEAS. Upon affirmance of a decree of divorce, with modifications as to the division of the property of the parties, requiring a money judgment against the defendant for attorney's fees and in lieu of specific property, judgment on the remittitur should be entered against the appellant and his sureties on the appeal and supersedeas bond, where the bond was in the statutory form under Rem. & Bal. Code, § 1722, conditioned to satisfy and perform the judgment or decree appealed from in case it should be affirmed, or any judgment the supreme court may render or order; in view of *Id.*, § 1739, requiring judgments against the sureties for the amount recoverable according to the condition of the bond.

SAME—JUDGMENT—CORRECTION OF REMITTITUR. Upon application and with due diligence (five days after filing the remittitur) the supreme court will recall the remittitur to correct an inadvertent omission in failing to direct entry of judgment against the sureties on an appeal and supersedeas bond, upon affirmance of the decree.

Motion to recall a remittitur, filed in the supreme court April 12, 1915. Granted.

Bates, Peer & Peterson, for appellant.

Miller & Lysons, for respondent.

ELLIS, J.—This case is here upon a motion of the respondent to correct the remittitur so as to include therein a judgment against the sureties on the appeal and supersedeas

¹Reported in 149 Pac. 328.

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bond for the amount of the money judgment rendered against the appellant.

On the appeal, we affirmed the decree of divorce in favor of the respondent, affirmed the judgment for \$1,000 attorney's fee and the award of the custody of the child to the respondent, and directed a modification of the decree, in so far as it awarded one-half of the appellant's property to the respondent, by substituting therefor a money judgment, the opinion closing as follows:

"We are of the opinion that the decree should be modified so as to give to the respondent a judgment against the appellant for \$10,000, payable \$2,000 in three months from the entry of the decree, \$3,000 in six months after the first payment, and \$5,000 in six months after the second payment, none of these sums to bear interest until after maturity; that there should also be awarded to the respondent the sum of \$25 a month for the maintenance of the child during its minority, payable into the registry of the court on the 15th of each and every month from and after the entry of the decree; that there be allowed to respondent's attorneys the sum of \$1,000 as an attorney's fee, which under the circumstances of this case we find reasonable, which sum shall be paid by the appellant within three months after the entry of the decree, without interest; that all of these charges, save the monthly payments for the child's support, be declared a lien on all of the stock and assets of the corporation, subject to any existing incumbrances thereon and subject to the pledge of the four hundred shares of stock in favor of Boone. The decree should also provide that appellant be permitted to visit the child at some suitable place other than the residence of any of respondent's relatives twice each month. The respondent may recover her costs.

"The cause is remanded with direction that the decree be modified to conform to this opinion." *Willson v. Willson*, 84 Wash. 240, 146 Pac. 615.

The bond is conditioned as follows:

"Now Therefore, if the said Herbert E. Willson, appellant as aforesaid, will pay all costs and damages that may be awarded against him on said appeal, or on the dismissal

thereof, not exceeding the sum of two hundred (\$200) dollars, and will satisfy and perform the judgment and decree appealed from, in case it should be affirmed, and any judgment or order which the supreme court may render or make, or order to be rendered or made by the above entitled court, then this obligation to be void, otherwise to be and remain in full force, virtue and effect."

This bond follows the statutory requirements contained in Rem. & Bal. Code, § 1722 (P. C. 81 § 1195). As to the power of the court in the premises, the statute, Rem. & Bal. Code, § 1739, provides:

"Upon the affirmance of a judgment or (on) appeal for the payment of money, the supreme court shall render judgment against both the appellant and his sureties in the appeal bond for the amount of the judgment appealed from (in case the bond was conditioned so as to support such judgment) and for the damages and costs awarded on the appeal; and in any other case of affirmance the supreme court shall likewise render judgment against both the appellant and his sureties in the appeal bond for the amount recoverable according to the condition of the bond, in case such amount can be ascertained by the court without an issue and trial."

The judgment in this case on appeal was in effect an affirmance. It affirmed the decree of divorce and, as ancillary thereto, awarded a money judgment in lieu of specific property. Under the statute, it is clear that the respondent is entitled to judgment against the sureties for the determinate amounts of the attorney's fee and the \$10,000 awarded against the appellant enforceable against the sureties in case these sums be not paid by the appellant when due. *Gust v. Gust*, 78 Wash. 414, 139 Pac. 228.

The matter of this bond was not called to our attention in the original briefs, nor by petition for rehearing or for modification of the opinion. The fact that the respondent was entitled to judgment against the sureties upon the bond was overlooked. This, however, is immaterial. While it would have been entirely proper to have included in our opin-

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ion a specific order to enter judgment against the sureties, as was done in the case of *Gust v. Gust*, *supra* (an almost exact parallel to this case), it is not an essential and, as a matter of practice, is not often done, the usual course being to include the order in the remittitur as a matter of course where a money judgment is warranted by the opinion read in the light of the statute. In such a case, the warrant for the judgment is found in the mandatory terms of the statute, rather than in any express direction in the opinion.

The fact that the time for a rehearing has expired does not preclude a recall and correction of the remittitur where, as in this case, the application has been made with due diligence. In this case the remittitur went down on April 7, 1915. The motion here under consideration was filed on April 12, 1915. As said in *Titlow v. Cascade Oatmeal Co.*, 16 Wash. 676, 48 Pac. 406:

"The respondent now seeks by this motion to have the judgment modified to the extent that judgment be entered against the appellant Richards and his sureties for the full amount of the judgment affirmed.

"An objection to this motion is made by the appellant to the effect that this court has lost jurisdiction of the cause and of the judgment by reason of the remittitur having been transmitted to, and filed in, the superior court. We think this objection is untenable. The appellate court has inherent power to correct its judgment during the terms in which the judgment was entered. The respondent, under our practice, has no notice of what the judgment is until it is remitted. The presumption must be that the judgment is entered in accordance with the opinion of the court, and it would be a hard and unjust rule to announce that, if by inadvertence or mistake the judgment should be entered not in conformity with the opinion, the respondent would have no redress. We think that in all jurisdictions, under a practice similar to ours, the court has power to recall the remittitur and enforce the judgment according to the opinion rendered in the case."

See, also, *Port Angeles Pac. R. Co. v. Cooke*, 98 Wash. 184, 80 Pac. 305. Even though it were necessary to include

such an order in the opinion, we would not be powerless to correct its inadvertent omission when discovered only after the transmission of the remittitur and on prompt application for the correction. *Peabody v. Edmonds*, 72 Wash. 604, 131 Pac. 250.

We are satisfied that, on the record in this case, the remittitur should be recalled and corrected so as to include therein a judgment against the sureties upon the supersedeas bond for the attorney's fee of \$1,000 and the \$10,000 awarded against the appellant, payable as in the judgment against the appellant, and to be enforceable as other judgments, in the event that the appellant fail to pay the judgment at the times specified therein. This should not include the provision for the \$25 a month made for the support of the child, which is contingent upon the child's life and hence indeterminate. This provision is sufficiently secured and enforceable by the usual proceedings as for contempt.

The clerk of this court is therefore directed to recall the remittitur and correct the same as herein directed.

MORRIS, C. J., MAIN, FULLERTON, and PARKER, JJ., concur.

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Syllabus.

[No. 12278. Department One. June 12, 1915.]

HALLIE STEWART *et al.*, *Appellants*, v. OMER FITZSIMMONS
et al., *Respondents*.¹

HOMESTEAD—SELECTION—FROM COMMUNITY PROPERTY—RIGHT OF SURVIVING HUSBAND. The act of 1895, Rem. & Bal. Code, § 558, providing for the selection of a homestead by the husband or other head of a family, by executing and acknowledging a declaration to be filed of record, authorizes the husband, after the wife's death, to select a homestead for the benefit of himself and family out of the community property, vesting title in him in fee; and the act supersedes that part of Rem. & Bal. Code, § 1465, requiring a "setting aside" of a homestead by the probate court where none had been claimed by "the head of a family in his lifetime."

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence will not be disturbed on appeal, unless it can be said that they were not sustained by the preponderance of the evidence.

CONSTITUTIONAL LAW—DUE PROCESS — HOMESTEADS — RIGHT TO—SELECTION—STATUTES. The selection of a homestead under the act of 1895, Rem. & Bal. Code, § 558, by the filing of a declaration for record, whereby title is vested in the head of a family, is not a taking or deprivation of the property of the heirs without due process of law; since the declaration does not shut off judicial inquiry, and the state may provide the method of asserting the right of homestead without requiring that it be by way of judicial proceeding, as long as opportunity to be heard in the courts is open.

HOMESTEAD—SELECTION—EFFECT ON TITLE OF HEIRS—DESCENT AND DISTRIBUTION—STATUTES. Construing in *part materia* the acts of 1895, pp. 197, and 109 (Rem. & Bal. Code, §§ 1366, 528 *et seq.*), the former vesting the title to real estate in the heirs upon the death of the ancestor without decree of distribution, and the latter defining a homestead and providing for the manner of selection, the acts are not inconsistent, but the heirs take the property *cum onere*, and subject to existing laws and the right of the surviving heirs to claim a homestead out of the property.

STATUTES—TITLE AND SUBJECTS. Rem. & Bal. Code, § 561, of the homestead act, defining the character of the title acquired by the claimant, is sufficiently germane to the title "an act defining a homestead and providing for the manner of the selection of the same;" and hence is not unconstitutional as determining the method of descent of property without expressing the subject in the title.

¹Reported in 149 Pac. 659.

Appeal from a judgment of the superior court for Garfield county, Miller, J., entered February 13, 1914, upon findings in favor of the defendants, in an action for partition and an accounting, tried to the court. Affirmed.

France & Helsell, for appellants.

Kuykendall & McCabe and *G. W. Jewett*, for respondents.

CHADWICK, J.—This action was brought by the appellants to secure the partition of certain property, alleged to be the community property of Peter A. Peterson and Jane H. Peterson, his wife. Peter A. Peterson filed on a government homestead in July, 1881. He married Jane H. Smelcer in September, 1881. The family settled on the land in October, 1881, a cabin having been erected and some fencing built previous to that time. Jane H. Peterson died in June, 1903. Her estate was administered by her surviving husband. Peter A. Peterson died in August, 1910. N. O. Baldwin is the executor of his last will and testament.

It is the contention of appellants, first, that the land is community property; second, that, if it is not, Peter A. Peterson and those claiming under him are estopped because of the fact that Peter A. Peterson, when acting as administrator of the estate of his deceased wife, listed the land as community property and administered upon it as such. The contentions of appellants are met by respondents by the claim that the property was the separate property of Peter A. Peterson; that there is no estoppel; and, furthermore, that the land was claimed as a homestead by Peter A. Peterson after the death of his wife, and became his separate property in virtue of the statutory declaration of homestead. No declaration of homestead had been made in the lifetime of Mrs. Peterson. The property claimed in the declaration of homestead consisted of one hundred and sixty acres entered as a government homestead, and forty acres out of one hundred and sixty acres which the Petersons had acquired as a preemption from the government. The trial judge found

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the one hundred and sixty acres to be the separate property of Peter A. Peterson; that the forty acres, being a part of their preemption, was community property and subject to the claim of homestead. He accordingly denied the prayer of appellants' complaint and rendered a decree quieting title in the respondents, who are devisees of Peter A. Peterson, subject to the administration proceedings now pending.

The judges are not in entire harmony with reference to the holding of the trial judge that one hundred and sixty acres government homestead was the separate property of Peter A. Peterson. We will not, therefore, review the facts which lead up to this holding, but content ourself with discussing the claim of a statutory homestead, which, in the opinion of all the judges participating in this case, is decisive. We shall treat the property as community property, as contended by appellants.

Jane H. Peterson died in June, 1903. Appellants take the position that, no claim of homestead having been filed in the lifetime of Mrs. Peterson, the property became subject to the orders of the court having jurisdiction of the estates of decedents, and that a homestead could not be set off except by order of the court after notice and hearing. Rem. & Bal. Code, § 1465 is relied on.

"If the head of a family in his lifetime had not complied with the provisions of the law relative to the acquisition of a homestead, the widow, or the child or children, may comply with such provisions, and shall be entitled, on such compliance, to a homestead as now provided by law for the head of a family, and the same shall be set aside for the use of the widow, child or children."

It is further contended that, unless the claim of homestead is supported by such an order after due proceedings and notice, it would result in depriving the heirs of property without due process of law, under Rem. & Bal. Code, § 1366, which vests title in the heir immediately upon the death of the ancestor. The statute is as follows:

"When a person dies seized of lands, tenements or hereditaments, or any right thereto or entitled to any interest therein in fee or for the life of another, his title shall vest immediately in his heirs or devisees, subject to his debts, family allowance, expenses of administration, and any other charges for which such real estate is liable under existing laws. No administration of the estate of such decedent, and no decree of distribution or other finding or order of any court shall be necessary in any case to vest such title in the heirs or devisees, but the same shall vest in the heirs or devisees instantly upon the death of such decedent." (L. '95, p. 197, § 1.)

Section 1465 was a part of the old probate practice act passed in 1854. The purpose was to give a widow and minor children the benefit of a homestead when none had been claimed by "the head of a family in his life time." That statute may well be called a widow's homestead. It required a compliance with the homestead law and a "setting aside" by the court for "the use of the widow, child or children." It is not in harmony with the spirit of the community property laws. It implies a title in the "head of the family" at the time of his death, and a title in the widow and child or children after it is set aside; whereas, a homestead is most often taken out of community property, in which the widow has the same interest as the head of a family and to which she has a right absolute as against her child or children. The unfitness of this statute and the situations possible under it no doubt led the legislature to meet the demand for a more certain and equitable law.

In 1895, the legislature passed a new and complete act, making the act of declaring a homestead a matter entirely independent of any proceeding in court, either before or after declaration.

"In order to select a homestead, the husband or other head of a family, or in case the husband has not made such selection, the wife must execute and acknowledge, in the same

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manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record." L. '95, p. 113, § 30; Rem. & Bal. Code, § 558.

It was the purpose of the act of 1895 to fix title in the community, and, on the death of either spouse, in the survivor. This statute was construed in *In re Feas' Estate*, 30 Wash. 51, 70 Pac. 270. After adverting to the spirit and history of the law, the court, speaking through Judge Hadley, said:

"We think it is the manifest spirit and intention of the law that a husband may, after his wife's death, select a homestead from the community property for the benefit of himself and family."

In *Stevin v. Thrift*, 30 Wash. 36, 70 Pac. 116, we held that all that part of Rem. & Bal. Code, § 1468 which vested any title in a child or children, was superseded by the act of 1895; that the tenure depended upon the character of the property from which the homestead was selected.

"If it is selected from community property in the lifetime of both spouses, it vests in the survivor in fee, and becomes his or her separate property; if it is selected from separate property, it goes, on the death of the person from whose property it was selected, to the heirs or devisees of such person, subject to the power of the court to assign it for a limited period to the family of the decedent."

If that part of the old law was superseded, and a survivor can claim a homestead under the act of 1895 after the death of his spouse, and title depends upon the character of the property and the act of 1895 alone, it follows that all parts of § 1465 which require a "setting aside" are superseded, and appellants' rights, if any, depend solely upon an answer to the questions, (a) whether the property was the separate property of Jane H. Peterson, (b) what was the value of the property at the time of the declaration, and (c) does a declaration of homestead by the survivor of a homestead work a deprivation of property without due process of law?

Inasmuch as appellants assert, and we have assumed, that the property was community property, we shall pass the first proposition without discussion.

The testimony as to value was conflicting. There is evidence to sustain the finding of the trial judge that it did not exceed the sum of \$2,000 at the time the declaration was made. The land is not what is known as first-class land in the county where it is situated. Out of the 200 acres, less than seventy acres is classed as farm land, the balance being pasture land. It is true that present values are shown to be largely in excess of the value found by the trial judge, but there is testimony to show that there had been a strong depression in prices of land, followed by a sharp raise in values, between the years 1903 and 1909. We are not prepared to say that the finding of the court in this respect is not sustained by a preponderance of the evidence.

Nor do we think that appellants have been deprived of property without due process of law. The right to declare a homestead is not an absolute right in the sense that a declaration shuts off proper judicial inquiry. In *Fairfax v. Walters*, 66 Wash. 583, 120 Pac. 81, we held the question of value to be open to inquiry, whatever the antecedent proceedings may have been. In its broad sense, due process means an opportunity to be heard in a court of competent jurisdiction upon any question affecting the personal or property rights of a citizen. A trial according to the "course, mode and usages of the common law." *Hoke v. Henderson*, 4 Dev. L. (15 N. C.) 1, 25 Am. Dec. 677. Stated in the alternative, a denial of due process means a denial of a right to be heard upon an issue of fact or law. If an opportunity to be heard remains, there is no lack of due process.

The state, in the exercise of its sovereign power, may define homesteads and provide the method of asserting the right of homestead. It is immaterial upon which particular ground the exercise of power is made to rest. It has the right or, as it is generally referred to, the duty to allow a

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citizen the privilege of claiming a homestead against which the claims of creditors will not run. Having that power, it is necessarily within the power of the state to fix the character of the title under which the property shall be held. It is not necessary that the state should provide for the exercise of this right by way of judicial proceeding. It is enough that all who have an adverse interest shall have an opportunity to be heard. Opportunity in this connection means that the doors of the courts are open. If they are, there can be no complaint because the legislature has seen fit to define a procedure which is not dependent upon a court proceeding.

The right of Peter A. Peterson to claim a homestead being referable to the sovereign power of the state, the case falls within the principle announced by this court in holding that the state, or any of its instrumentalities, having power to exercise the right of eminent domain, would not be ousted as for trespass after taking property and before ascertaining the damages to be paid; this, upon the theory that a right to take is a sovereign right and that the remedy in damages was open to the aggrieved party under the forms, modes and usages of the common law. *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820; *Casassa v. Seattle*, 75 Wash. 367, 134 Pac. 1080.

In *Crosier v. Cudihee*, 85 Wash. 237, 147 Pac. 1146, it was contended that there had been a denial of due process. We said:

"The fact that appellant is in court seeking the validity of his lien against that of respondents is a sufficient answer to his contention that he has been deprived of his property without due process of law."

In *Weber v. Doust*, 81 Wash. 668, 143 Pac. 148, we quoted from McGehee on Due Process of Law, p. 52, holding that a judicial proceeding in a formal court is not essential to due process; that a hearing subsequent to the exercise of summary process is sufficient.

It is further contended that the title was vested in appellants as heirs upon the death of the ancestor, in virtue of § 1366 of the code. This section of the code was adopted at the 1895 session of the legislature, Laws of 1895, p. 197, a few days after the homestead law, Laws of 1895, p. 109, was passed. The two acts may be sustained without violating the provisions of either. When construed *in pari materia*, it seems clear that the legislature intended to vest title in the heirs, subject to existing laws and the right of the surviving spouse to assert a homestead out of the property. Laws fixing the descent of property are usually general in their terms. Property descends subject to existing laws and the right of the state to charge it with the debts of the deceased person and with the support of his family or a part of his family. The fact that the state has seen fit to fix the title in a general way at the time of the death of an ancestor instead of by decree of distribution creates no greater right or interest in the heir than he had before the act was passed. He takes the property under the statute relied on, *cum onere*. All legal charges and incumbrances, whether resting in contract or in statute, are paramount to his claim of title. The legislature must have had the claim of homestead in mind when passing the act, for title is made subject to "debts, family allowance, expenses of administration, and any other charge for which such real estate is liable under existing laws."

Counsel finally contend that § 561 of the code, being section 33 of the act of 1895, is unconstitutional in that the title of the act is not sufficiently comprehensive to sustain it. After quoting the title, "An act defining a homestead, and providing for the manner of the selection of the same," they say:

"Section 561 does something quite different than provide for the manner of the selection of a homestead. It determines the method of descent of community real property, a subject not at all germane to the defining of a homestead and the selection of the same."

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Syllabus.

We nevertheless are constrained to believe that the questioned section refers to matters that are germane to the title. The words "providing for the manner of the selection of the same" might be omitted so far as the question raised by counsel is concerned. The words "an act defining a homestead" are sufficiently comprehensive to sustain the section of the act defining the title under which a homestead is to be held. The legislature could not well define a homestead without providing for the manner of its selection and the tenure under which it is held. The object of all homestead laws is to make provision for the head of a family, and an act fixing and defining the character of the title does no violence to any of the statutes of descent.

Finding no error, the judgment of the lower court is affirmed.

MORRIS, C. J., PARKER, MOUNT, and HOLCOMB, JJ., concur.

[No. 12277. Department One. June 12, 1915.]

HALLIE STEWART *et al.*, Appellants, v. N. O. BALDWIN, as
Executor of the Estate of Peter A. Peterson et al.,
 Respondents.¹

EXECUTORS AND ADMINISTRATORS—SALES—VALIDITY—PURCHASE BY EXECUTOR—CONSTRUCTIVE FRAUD—EVIDENCE—SUFFICIENCY. The executor, by procuring a sale of the real estate to pay debts without giving the court an opportunity to determine the advisability of remortgaging the land, is guilty of a constructive fraud upon the heirs, where it appears that the bulk of the remaining indebtedness was represented by a mortgage for the sum of \$1,750; that, upon being advised that he must find a purchaser, he represented that his son, who was just 21 and without means, would buy the property, and cash for the bid was procured by arrangements for a new mortgage, the property was bid in by the son for the appraised value \$2,000, and father and son gave a new mortgage for the amount, secured upon the property sold and other property belonging to the father; that the son paid no consideration, made the bid at his father's request, received no part of the rents and profits, and later conveyed

¹Reported in 149 Pac. 662.

the land to his father without consideration; since, in the absence of statute, an executor may not bid at his own sale, and since the transaction amounted merely to a change of mortgages and transfer of title to the executor; and since, in his fiduciary relation, when he could not sell to any one but himself, equity required and he owed the duty, under Rem. & Bal. Code, §§ 1503, 1505, to allow the court to examine witnesses and determine whether it was for the best interests of the estate to sell or to remortgage the property for the purpose of paying the mortgage indebtedness (HOLCOMB, J., dissents).

SAME—CONSTRUCTIVE FRAUD—NOTICE. A constructive fraud by an executor in indirectly purchasing at his own sale, arises irrespective of his motive or any moral wrong; and the fraud need not be proved by strong convincing evidence, slight circumstances being sufficient in view of his duty as trustee.

Appeal from a judgment of the superior court for Garfield county, Miller, J., entered February 13, 1914, upon findings in favor of the defendants, in an action for equitable relief, tried to the court. Reversed.

France & Helsell, for appellants.

G. W. Jewett and Kuykendall & McCabe, for respondents.

CHADWICK, J.—This case comes to us along with No. 12278, *Stewart v. Fitzsimmons*, ante p. 55, 149 Pac. 659. Jane H. Peterson, the wife of Peter A. Peterson, died in the year 1903, leaving as a part of her estate 120 acres of land which was part of a preemption entered by her husband, Peter A. Peterson. The 120 acres was community property. The estate was indebted to various persons and firms. In November, 1903, Peter A. Peterson, the administrator of his wife's estate, filed a petition praying for the sale of the land, in order to pay the debts of the estate and the expenses of administration. At that time, the bulk of the debts had been paid by the administrator, either out of the property of the estate or on account of advances which, it is now claimed, he made out of his own funds. The bulk of the remaining indebtedness was represented by a mortgage upon the 320 acres to which we have referred in *Stewart v. Fitzsimmons*, supra, for the sum of \$1,750, in favor of one D. P. Thomp-

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son. The mortgage had been executed by Peter A. Peterson and Jane H. Peterson. Peterson was advised by his attorney that it would be necessary for him to find a purchaser for the land. After a short time, he told the attorney that his son Albert would buy the property. When told that he (Albert) did not have sufficient funds to buy for cash, the attorney advised Peterson to go to a Mr. Campbell and see if an arrangement could not be made to get the money. An arrangement satisfactory to the parties was made, the sale was had, and Albert Peterson was returned as the purchaser.

Mr. Campbell was the local agent of D. P. Thompson, and, also, the local agent of A. W. Ocobock. When the sale had been made and confirmed, a release of the D. P. Thompson mortgage, which then with interest amounted to \$1,906, was made. Peter A. Peterson filed a declaration of homestead upon the 200-acre tract and, at the same time, executed a deed to Albert Peterson for the 120 acres. A new mortgage was then drawn in favor of Ocobock to secure a note signed by Albert Peterson and Peter A. Peterson. A mortgage was taken upon the whole 320 acres, the 200 acres which Peter A. Peterson had claimed as a homestead and the 120 acres said to have been purchased by Albert Peterson. Albert Peterson testified that he had no money; and that he bought the land because his father requested him to do so. The 120 acres and the 200 acres, being the original farm of 320 acres, was farmed and used as one tract of land by the family, consisting of Peter A. Peterson and Albert Peterson and three minor children. Albert Peterson testifies that he received no part of the rents, issues and profits of the place. In September, 1905, he reconveyed the property to his father, no consideration passing between them except the assumption of the mortgage debt.

Plaintiffs contend that the sale of the land to Albert Peterson operated as a constructive fraud upon their right to share in the estate of Jane H. Peterson; that, in truth

and in fact, Peter A. Peterson became, through the instrumentality of his son Albert, a purchaser at his own sale, and thereafter held the property in trust for the heirs. Upon this state of facts, the court below held that the administration sale to Albert Peterson was:

"Legally made and fairly conducted, and that the sum bidden and paid was the full value of the property sold and that said sale was *bona fide* and without fraud or collusion between the said Albert Peterson and Peter A. Peterson. That the said sale of Albert Peterson to Peter A. Peterson was a *bona fide* sale, for value, and was without fraud or collusion between the said parties, or at all."

It is true that the land was struck off at the administrator's sale for a sum approximating its value—it had been appraised at \$2,000—and we have no doubt that Peter A. Peterson was acting in good faith and with no desire other than to lodge the title in himself freed of the embarrassment of having his property subjected to further administration. It is perhaps unfortunate that our community property laws do not preserve at least a life estate in the survivor instead of forcing the dissolution of a relation to property which has too often resulted in financial sacrifice. We are impressed with the observations of Mr. Woerner in his "The American Law of Administration:" Vol. 2 (2d ed.), footnote, § 334:

"But neither the array of English authorities . . . nor the emphatic indorsement of the doctrine by the Supreme Court of the United States and the authorities there cited, showing the same to be in consonance with the civil law and codes of European countries, quite vindicate it [the rule against trustees purchasing at their own sales] against all misgivings as to its applicability to executors and administrators. The very depth to which the remedy goes, as emphasized by Chancellor Kent, suggests the doubt in its practical wisdom. In uprooting the evil, valuable safeguards to the substantial interests of the parties sought to be protected are destroyed with it. By removing the possibility of a fraudulent acquisition on the part of the executor or administrator the power to protect the interests of beneficial

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owners by securing to them the value of their property is likewise swept away. Frequent instances are within the experience of judges of probate and practitioners in probate courts, that the only possibility of rescuing from the otherwise total sacrifice and wreck of the estate a remnant for the widow and orphans is to let the widow (if she be, as she generally is, the administratrix) buy in and keep the property, accounting for the price it brought at the public or private sale. So embarrassing does this deeply cutting doctrine operate in some instances, that where, upon the death of a husband and father, the widow desires to keep the family together, and preserve as much of the home and property belonging to them as is consistent with full justice to the creditors (and which often amounts to a sufficiency for the decent support of the family), the widow is reduced to the necessity of either renouncing her right to administer, or risking the sacrifice of the property, because the law will not permit her as administratrix to compete at the sale with strangers or creditors."

If the sale was a *bona fide* sale to Albert, and the repurchase by Peter A. Peterson was made without reference to the former proceedings, these observations of course are not apt. But we are of the opinion that the sale was, in legal effect, a sale to Peter A. Peterson, and that whatever inconvenience may result to a surviving member of a community, the general rule that an administrator cannot buy, either directly or indirectly, at his own sale must be followed in the absence of a statute authorizing him to purchase, or unless some controlling equity intervenes to bar the *cestui que trust*. Woerner, American Law of Administration, §§ 334, 487; *Davoue v. Fanning*, 2 Johns. Ch. 251; *Michoud v. Girod*, 4 How. 503; 18 Cyc. 326.

The courts did not make the law vesting title in the heirs upon the death of an ancestor, nor did they decree that a child shall take equally with and during the lifetime of a surviving member of a community. Those rights depend upon legislative enactment, and our statutes give to a surviving

child an immediate interest of which the courts must take notice.

An administrator stands in a fiduciary relation to those beneficially interested. He is subject to the universal rule that a trustee is bound to do that which will best serve the interests which for the time are intrusted to his care. His own good faith is not enough.

A somewhat similar transaction was had in the case of *Dormitzer v. German Sav. & Loan Soc.*, 23 Wash. 132, 62 Pac. 862:

"It may be conceded that there was no intention—and we think that is a fact—on the part of the attorneys, the probate judge, Tull, and the respondent, to injure the appellants, and that they acted from the best of motives; but the fact stands out, nevertheless, that they perpetrated in law a fraud upon the children."

Now, what did equity require of the administrator? He had a right to petition the court for a sale of the property, but when it became apparent to him that a sale could not be made except to himself or through the intervention of his son, who acted entirely under his direction and advice and, in part at least, upon his credit and the credit of his own land, and that the net legal result of the proceeding to sell was to change the form of the mortgage debt which was the basis of his petition to sell, equity required of him that he report that fact to the court and take an order allowing him to remortgage the property, for the statute under which he was proceeding provided for the mortgage of property as well as its sale.

The law enjoins the sale of land belonging to estates of deceased persons with reluctance, and while it may be an irregularity to sell where a mortgage should have been made, which is cured by confirmation—that question is not before us—the statute clearly implies that the court shall have an opportunity to pass upon the question whether the

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property shall be mortgaged or sold. Rem. & Bal. Code, § 1503, provides for notice, a hearing and the examination of witnesses.

Section 1505 provides:

“ . . . the court shall then proceed to determine which method of raising such funds will be most beneficial to the estate and those interested therein, and shall thereupon make an order authorizing the executor or administrator to sell the whole or so much and such parts of the real estate described in the petition as the court shall adjudge necessary or beneficial, or authorizing the executor or administrator to mortgage the whole or so much and such parts of the real estate described in said petition as the court shall adjudge necessary or beneficial, according as the court shall determine one or the other methods most beneficial to the estate and those interested therein.”

The petition in this case makes no reference to, nor did the court have an opportunity to pass upon, the advisability of remortgaging the land to take up the D. P. Thompson note and mortgage. We are assuming that it was necessary to raise money to pay off the D. P. Thompson mortgage in March, 1904. It is suggested rather than asserted by counsel for respondents, although it is not entirely clear that it is so.

This court has consistently held trustees and agents acting in a fiduciary capacity to the rule of strict accountability. In *Coughlin v. Holmes*, 53 Wash. 692, 102 Pac. 772, we held that a sale by a county treasurer to himself or his deputy was against public policy and void. In *Roger v. Whitham*, 56 Wash. 190, 105 Pac. 628, 134 Am. St. 1105, we held that a city attorney could not bid in property at a sale conducted by him and assert equitable defenses against the owner. In *Miller v. Winslow*, 70 Wash. 401, 126 Pac. 906, Ann. Cas. 1914 B. 833, a sale by a sheriff to himself was held to be invalid.

The facts upon which we base our opinion that the sale was constructively fraudulent as to the heirs of Jane H.

Peterson are that the administrator did not in law or equity sell the property at all, but with his son Albert gave his own note and mortgage to secure the payment of the same debt to another mortgagee. While it is asserted that this amounts to an actual cash transaction, as a matter of fact it was, to the extent of \$1,750, a mere matter of book-keeping by the agent of the mortgagees—the old and the new. This result might have been accomplished without passing the title through his son Albert. Albert was a boy just passed twenty-one, and it is not shown that he had any independent means, nor is it shown to our satisfaction that he thereafter exercised that dominion which suggests ownership. “It was understood” that the property was Albert’s, “It was treated and regarded” as Albert’s, that Albert “did the bossing,” are terms altogether too general to base a finding upon, especially when considered in the light of the fact that Albert, some time after the sale back to his father, had the land rented, and the further fact that this showing, such as it is, depends upon the testimony of those to whom the property of Peter A. Peterson was bequeathed and devised, to the exclusion of the children of Jane H. Peterson by her first husband. The fees for the recordation of the mortgage and other instruments entering into the transaction between father and son were charged to and paid by the estate. The land was resold for no consideration other than the assumption of the very debt which the old mortgage was given to secure. It would do violence to credibility to say that it was a new debt because it had been underwritten by Mr. Ocobock. This alone was held to be controlling in *Boynston v. Brastow*, 53 Maine 362. It is there said:

“It is enough, however, for us to know that the property was redeeded to one of the trustees for the same consideration for which it was sold, before his duties as trustee were ended. Equity will not permit a trustee thus to deal with the trust property, except for the benefit of the *cestui que trust*. Sound policy requires all the skill and efforts of a trustee to be used for the benefit of the *cestui que trust* ;”

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Counsel seek to sustain the sale by urging upon our attention the fact that the mortgage to Ocobock was for the sum of \$1,700, whereas the sale was returned at \$2,000, the appraised value of the land, and that we must assume that Albert contributed at least \$300, and if we do, this would sustain the sale. Albert testified that he paid no money. This statement is not impeached by the testimony of any witness or by any collateral circumstance. If we are to indulge in presumptions, it would seem rather that the father met this difference. It is a fair inference that, if he could find money to pay obligations of the estate, aggregating about \$1,300, out of his own pocket, that he could find enough to make up the difference between \$1,700 and the \$2,000 returned by him as the price for which the land was sold.

Respondents assume that appellants cannot recover unless we believe the testimony of Albert Peterson, and that he is unworthy of belief because,

(a) He has shown a vindictive character, in that he testified that his father at one time took four horses and a wagon and deserted the family—was gone a year. We do not regard this testimony as vindictive or as tending to blacken the character of his father. The conclusion drawn from the facts testified to is not evidence and we have endeavored to disregard it entirely.

(b) Because Mr. Start, who made out the deed from Albert to his father, testified that Albert said he was owing his father and made the deed in settlement of all sums owing by him. Mr. Start's recollection is not sufficiently clear to overturn the presumption attending the transaction. As we read his testimony, he tried to frankly admit that he had no memory of any conversation. He said:

"Q. You may state if you have any memory of the execution of that deed. A. I know that I acknowledged the deed, but I cannot state definitely whether I drew the deed. The party signing the deed acknowledged it before me and I also

witnessed the deed, but as to drawing it I could not state definitely. I presume, though, that I did. Q. Do you remember any conversation at that time by and between Albert Peterson and his father in regard to the consideration for that deed? . . . A. Regarding the consideration, you say? Mr. Jewett: Yes. A. No, I don't know that I remember anything further than they gave me the consideration of the deed. Q. What did they give you as the consideration? A. The consideration was \$5,000 stated in the deed. Q. Was there any conversation between them and you at that time? Mr. Jewett: Q. In regard to—I don't want to be leading—any indebtedness? A. To the best of my recollection there was some conversation between them to the effect that this deed was being given in payment of some obligation between them or some difference. Q. Was it your understanding of the conversation that settled up the account between Albert Peterson and P. A. Peterson at that time? A. That was my recollection of the conversation. Mr. Jewett: Q. Now, this mortgage . . . How much was that mortgage? A. I believe the mortgage was \$1,700. (Cross examination.) Q. Do you recall this conversation clearly, or the other one? You say to the best of your recollection. I want to know how clear your recollection is. A. That is as near as my memory serves me. Of course I cannot remember back to 1905, that long a time. Q. There was nothing about this transaction to call your mind any different than any other transaction? A. No, I think not. Q. You don't know what was said, the words? A. Not the exact words, no."

(c) That it would have been impossible for Peterson, unlettered and unlearned as he was, to conjure and work out a fraud without the knowledge of his attorney, who is admittedly free of any wrongdoing.

This contention might have some weight if we found that there was a designed fraud. We do not think there was actual fraud or intent to defraud. Constructive fraud may arise however free from ulterior design the mind may be. Constructive fraud is a legal inference; a conclusion which arises, not from the facts admitted or proven alone, but when such facts are considered in connection with a legal

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relation, a duty imposed by law. We find nothing in this case to justify the belief of counsel that this case is an assault upon the character of Peter A. Peterson. He evidently thought he was acting within the law. Equity does not measure legal rights by thoughts. It takes account of the consequences of human conduct. It may be admitted that Peter A. Peterson was guilty of no moral wrong.

"A constructive fraud has been said to be 'an act which the law declares to be fraudulent, without inquiring into its motive; not because arbitrary rules on this subject have been laid down but because certain acts carry in themselves an irresistible evidence of fraud.'" 20 Cyc. 9.

See, also, *Roger v. Whitham*, *supra*; *West v. Waddill*, 33 Ark. 575; *Huston v. Cassedy*, 13 N. J. Eq. 228.

The logic of our previous holdings is that it is not enough that the act of a fiduciary shall be free from moral wrong; his act must be above suspicion. The rule in such cases is not as contended by counsel, that a fraud must be proved by evidence, strong, cogent and convincing, but having in mind the duty imposed upon the trustee that "slight attending circumstances are enough to prompt the discretion of the chancellor." *Roger v. Whitham*, *supra*.

In 1909, Peter A. Peterson sold his 200-acre homestead and the 120 acres to Omer Fitzsimmons, taking his notes for \$16,000. These notes were secured by mortgage on the land. The sale to Fitzsimmons is not in question. It follows that plaintiffs are entitled to their proportionate share of the rents, issues and profits of the land from the time the administrator was discharged, up to the time the land was sold to Fitzsimmons, approximately five years, and to their proportionate interest in the notes given by Fitzsimmons in payment for the 120 acres. The rents, issues and profits of the land have not been shown with sufficient definiteness to warrant a decree for any certain sum. We may assume that the earnings of the land cannot be definitely shown. This being so, plaintiffs are entitled to their proportionate share

of the fair rental value, which from the conflict of the evidence we find to be \$2 per year upon each acre, for five years.

The decree of the lower court is reversed, and the cause remanded with instructions to enter a decree in accordance with this opinion.

MORRIS, C. J., PARKER, and MOUNT, JJ., concur.

HOLCOMB, J. (dissenting)—I dissent: The evidence shows that, although Peter A. Peterson acquired the land from his son Albert, Albert had acquired the same through a necessary, fair and open administrator's sale, during the administration of his mother's estate, about the end of the year 1903; that he thereafter had used and managed the land as his own, until September, 1905, when his father repurchased it from him for an adequate consideration. Thus, it seems, he acquired title in himself exactly the same way and to the same extent as if he had purchased a tract that had never been a part of his deceased wife's estate, and from an entire stranger thereto. In such case it would be her separate estate, and so I think it should be held in this case. There was neither actual nor constructive fraud upon the heirs.

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Opinion Per Curiam.

[No. 12403. Department One. June 15, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. C. M. NEWALL,
Appellant.¹

CRIMINAL LAW—APPEAL—REVIEW—VERDICT. A conviction will not be set aside because against the weight of the evidence, if supported by testimony, no matter how improbable, if there be a possibility that it is true.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered April 11, 1914, upon a trial and conviction of rape. Affirmed.

William R. Bell, for appellant.

Alfred H. Lundin, *Crawford White*, and *Joseph A. Barto*,
for respondent.

PER CURIAM.—The only question in this case is whether the court should have granted a motion for a nonsuit, or set aside the verdict because the facts were insufficient to sustain a conviction.

Whatever our own opinion of the weight of the testimony may be, we are satisfied that there was enough to carry the case to the jury, and that it was for it to say whether the case so made was overcome by the testimony of the appellant and that given in his behalf. However improbable testimony may be, a jury has a right to believe it, and if there be a possibility that it is true, a court will not disturb its findings.

We have read the record carefully, and are satisfied that neither the prosecuting witness nor the defendant told the whole truth; but we are not prepared to say that the jury did not find enough truth in the story told by the prosecuting witness to justify the verdict.

Affirmed.

¹Reported in 149 Pac. 324.

[No. 12253. Department Two. June 16, 1915.]

T. RYAN, *Respondent*, v. S. L. DOWELL, *Appellant*.¹

EVIDENCE—OTHER TRANSACTIONS—FRAUD—GENERAL SCHEME. In an action to recover for fraud practiced upon a street contractor in selling sand and gravel, through the manipulation of a duplicating pad of delivery slips and receipts, whereby two receipts were obtained for a single delivery, resulting in overpayments, it is admissible to prove that the defendant had defrauded another street contractor in the same way at about the same time; since it reasonably authorizes the inference that each of the frauds was in pursuance of a general scheme and proceeded from the same motive.

WITNESSES—CROSS-EXAMINATION—REBUTTAL. Where, in an action for fraud in duplicating delivery slips for gravel sold, resulting in overpayments, a witness for defendant had endeavored to make it appear that a discount had been given to avoid trouble rather than because duplicates had been discovered, it was competent, on cross-examination, to show that the discount was equal to the entire profit on the contract.

EVIDENCE—DOCUMENTARY EVIDENCE—DUPLICATES—COMPARISONS—FRAUD. In an action for fraud in manipulating a delivery pad so as to produce duplicate receipts for a single delivery, resulting in overpayments, the slips delivered to plaintiff are admissible for the purpose of comparison by the jury.

ACCOUNT STATED—WHAT CONSTITUTES—SETTLEMENTS—FRAUD—OVERPAYMENTS. In an action for fraud in manipulating a delivery pad so as to produce duplicate receipts for a single delivery, resulting in overpayments, the fact that the bookkeepers of the respective parties met monthly and checked over the slips showing the amounts delivered and agreed upon the quantities, does not make the agreements an account stated, or preclude the plaintiff from showing the truth of his allegations that, by reason of the fraud in relation to the slips, he was misled as to the amounts delivered.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 9, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action for fraud. Affirmed.

William Wray, for appellant.

Gill, Hoyt & Frye, for respondent.

¹Reported in 149 Pac. 343.

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Opinion Per FULLERTON, J.

FULLERTON, J.—In the last half of the year 1913, the respondent, who was plaintiff below, paved certain streets of the city of Seattle under contract with the city. In the work of paving, he was required to use sand, gravel and cement, and these he purchased from the appellant to be delivered as needed at the place of use, at prices per yard for the sand and gravel and prices per barrel for the cement, mutually agreed upon. During the progress of the work, partial accountings were had monthly between the parties, and payments were made to the appellant by the respondent on the basis of such accountings.

As a means of keeping an account of the quantities of materials delivered, the appellant furnished his deliveryman with salesman's pads, bound in tablet form, with alternating white, yellow and pink slips. The white and yellow slips were carbonized on their backs, and the three were so bound together in the pads that a writing on the white slip would reproduce in the same relative position on the yellow and pink slips. On the delivery of materials of any sort, the kind and quantity thereof would be written on the white slip by the deliveryman. The pad would then be handed to the person receiving the material, who would write his name on the white slip as a receipt. The yellow duplicate would then be torn from the pad and delivered to the receiver, and the white and pink slips retained for the use of the appellant. From these slips, the quantities delivered between the times of the settlements were made up; the respondent relying for the accuracy of the account upon the signatures of his foreman and assistants as they appeared upon the white slips, rather than upon the duplicate slips delivered to him.

As the work neared its close, the respondent conceived that he had been overreached and defrauded in these partial settlements; that the actual quantities of sand, gravel and cement delivered was much less than the claimed quantities, and that he had been induced to pay for a large quantity of such materials in excess of that actually delivered.

The present action was instituted to recover the overpayments. On the trial, the respondent's evidence tended to show that he had been overreached by the fraudulent manipulation by the deliveryman of the slips in the pads mentioned. As the pads were prepared and put together by the manufacturer, a writing on the white slip would reproduce only on the succeeding yellow and pink slips. But it was found that, by removing the pink slips, the writing on the white slip could be made to reproduce on two or more succeeding white and yellow slips, thus duplicating the signatures on the white slips, and enabling the appellant to turn in two or more such slips for a single delivery; that such slips were actually duplicated by the process mentioned and afterward turned in, enabling the appellant to receive, as the jury found, an excess payment for the three articles mentioned of the sum of two thousand dollars.

In the course of the trial, over the objection of counsel, the respondent was permitted to show that the appellant had used the same means to defraud other contractors with whom he had contracts to furnish sand, gravel and cement, who were engaged in making street improvements in the city of Seattle at the time the respondent was so engaged; and was also permitted to show by a witness, who had formerly been an employee of the appellant, that the witness had manipulated the pad books in the manner indicated on one such contract, under the express direction and instruction of the appellant.

It is the appellant's contention that this testimony was erroneously admitted, on the principle that, in civil as well as in criminal actions, evidence of the commission of another act of fraud or crime is not admissible to prove the fraud or crime charged. The case of *McKay v. Russell*, 3 Wash. 378, 28 Pac. 908, 28 Am. St. 44, is cited as sustaining the contention. That was an action to recover money paid on a contract for the sale of real estate, on the ground that the contract was procured by fraudulent representations. It

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was held that it was not competent to show that, in a similar transaction with another person had prior thereto, the defendant had made like misrepresentations. It would seem, on first impression, that the case might be in point; but the respondent calls attention to the case of *Yakima Valley Bank v. McAllister*, 37 Wash. 566, 79 Pac. 1119, 107 Am. St. 823, 1 L. R. A. (N. S.) 1075, where an exception to the general rule announced in the earlier case was noticed, and makes the claim that the present case falls within the exception. The last cited case was an action upon a promissory note. The defense was that the endorsement thereon, by which alone the defendant could be bound, was not written by the defendant as an endorsement of the note, but was written in the belief that he was signing another instrument not creating a liability, for which instrument the persons conducting the transaction had fraudulently substituted the note. It was held admissible to show that the same parties, by similar methods, at about the same time, had procured endorsements of notes from other persons. In distinguishing the cases, this language was used:

"It is insisted by the appellant that this testimony was inadmissible, and reliance is placed upon the case of *McKay v. Russell*, 3 Wash. 378, 28 Pac. 908, 28 Am. St. 44; and it might appear at first blush that that case was in point in favor of appellant's contention. In that case, which was an action to recover money paid upon a contract for the sale of real estate on the ground that the sale was procured by fraudulent representations, it was held that it was inadmissible to show that, in a similar transaction prior thereto, defendants had made like misrepresentations to another party. But an examination of that case fails to show that there was any testimony offered that would show a general scheme connecting the transaction, which it was sought to prove, with the transaction which was in issue in the case. It is no doubt true, as a general proposition, that testimony tending to show that a person has committed another crime is not admissible for the purpose of showing the probability of his commission of the crime charged. But it is equally true

that it is competent to show a general scheme to defraud, so connected with the case under consideration, by time and circumstances, that it will have a tendency to raise the presumption that the fraud charged was a part of the general scheme so proven. This court held in *Oudin v. Crossman*, 15 Wash. 519, 46 Pac. 1047, that, in an action to recover a sum of money which plaintiff had been induced to pay for the purchase of a mine, in reliance upon false representations of the defendants, evidence was admissible showing that the defendants had made representations to other parties than plaintiff, and to people in the vicinity generally, regarding the existence and character of the mine and the value of its ores, such representations being part of one continuous scheme or transaction for the purpose of selling the mine to any one that could be induced to buy. And so, in this case, the testimony, if true, showed conclusively a general scheme to perpetrate this particular kind of a fraud upon the people of a certain neighborhood at the same time, for the purpose of selling them insurance policies. The rule is thus clearly announced in 14 Am. & Eng. Ency. Law (2d ed.), pp. 196 and 197.

“‘A charge of fraud in a particular transaction cannot be proved by evidence of other and independent frauds of the party charged, though in a similar transaction, unless it appears that there is such a connection between the transactions as to authorize the inference that the frauds are both parts of a general scheme or purpose to defraud If the other fraud as to which evidence is offered is similar in character to the fraud alleged, and so connected with the transaction under investigation in point of time and otherwise as to reasonably authorize the inference that both frauds were in pursuance of a general scheme or purpose to defraud in such cases, the evidence is admissible. This is well settled as a general rule, though in its application there is not entire unanimity in the cases. The chief reason for admitting evidence of other frauds in such a case is that, where transactions of a similar character by the same party are closely connected in time, the inference is reasonable that they proceed from the same motive.’”

The present case, we think, falls within the rule of the later case, rather than the rule of the earlier one. The fraud as

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to which the evidence was offered was similar in point of time and circumstance to the fraud alleged, and reasonably authorized the inference that each of the frauds was in pursuance of a general scheme and proceeded from the same motive.

In the cross-examination of a Mr. Grover, a witness for the appellant, the following appears:

"Q. Now in the Normile & Petler account where you allowed them thirty yards out of 147 or 150 approximately, that allowance of thirty yards would more than eat up any profit you could make on that job, wouldn't it? Mr. Wray: That is objected to as calling for a conclusion. The Court: Objection overruled. A. I don't think so. Q. In other words there is more than 25 per cent profit in the sand and gravel business? Mr. Wray: That is objected to, if the Court please. The Court: Objection overruled. Mr. Wray: I desire an exception. Q. What is your answer to that? A. I don't suppose,—no it wouldn't be all the profit. It wouldn't leave very much to us though. Q. There would be some profit after the 25 per cent was allowed, would there? A. Well, yes. He said he would allow the whole thing though rather than have a dispute over it."

This is assigned as error because not proper cross-examination. But we think it proper cross-examination. The witness had endeavored to make it appear that the discount concerning which he was testifying was given to avoid trouble, rather than because duplicates in the account slips had been discovered, and clearly it was competent, as combating the reason given, to show that the discount made was equal to the entire profit on the contract.

The respondent was also permitted, over the objection of the appellant, to introduce in evidence certain of the yellow slips delivered to him claimed to be duplicates, so that the jury might themselves make a comparison. We can see no error in the court's ruling. The very question in dispute was whether certain of the receipts had been duplicated, and either the receipts themselves, or their duplicate copies made by the appellant, were admissible to prove the fact.

The court gave to the jury, among others, the following instructions:

"If you find from the evidence that the white slips obtained by the defendant, or any of them, were obtained by fraud and did not represent material actually delivered, then you are at liberty to disregard the account of the defendant and estimate the amount of material actually furnished by defendant to the plaintiff from the other evidence in the case."

There was evidence tending to show that the bookkeepers of the respective parties met monthly during the continuance of the contract and checked over the slips showing the amount of materials delivered up to the times of the meetings, and agreed upon the quantities. It is the appellant's contention that the agreements became accounts stated, and that the court's instruction was erroneous in that it permitted the jury to regard them otherwise than as conclusive between the parties. But aside from the fact that we think the evidence shows that these agreements were but tentative at best, the respondent alleged that, by reason of fraud perpetrated by the appellant in relation to the slips on which the settlements were based, he was misled into believing that a greater quantity of materials had been delivered than was actually delivered. Clearly, under these circumstances, the respondent was not estopped from showing the truth.

There is no error in the record, and the judgment will stand affirmed.

MORRIS, C. J., ELLIS, MAIN, and CROW, JJ., concur.

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[No. 12422. Department One. June 16, 1915.]

EMILY ARPAGAUS *et al.*, Respondents, v. WASHINGTON WATER
POWER COMPANY, Appellant.¹

STREET RAILROADS—INJURIES—COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. A driver of a team of horses is guilty of contributory negligence, as a matter of law, precluding any recovery for his death caused by colliding with an approaching car, where it appears that he was driving west on the wrong side of the street or making a diagonal cut across a jog in the street, and in a place where the law of the road and common prudence required him not to be in, that he could have seen the approaching car in time to avoid the accident had he looked when he came in view before driving onto the track, but turned his horses at right angles abruptly in front of the car so that the off horse was struck in the shoulder and the accident made inevitable (HOLCOMB, J., dissents).

SAME—NEGLIGENCE—PROXIMATE CAUSE. Liability in such a case cannot rest upon the rule of wilful and wanton injury, as the proximate cause, since there was nothing to indicate to the motorman that the deceased intended to pull across the track, until the moment of the collision.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered May 22, 1914, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for wrongful death. Reversed.

Post, Avery & Higgins, for appellant.

John M. Bunn and *Turner & Geraghty*, for respondents.

CHADWICK, J.—About seven o'clock in the evening of August 21, 1913, Alois Arpagaus, fifty years old and engaged in a small way in the transfer business in the city of Spokane, was returning after a day's work to his home. His way led from Munroe street west on College avenue to Walnut street. Walnut street runs north and south, and College avenue east and west. He turned north on Walnut street. The testimony is conflicting as to whether he was driving fast or slow.

¹Reported in 149 Pac. 346.

Witnesses for the plaintiffs say that he was walking his horses; that he was jogging along; that he was going at a slow trot; whereas, some of the witnesses for the defendant say that he was driving at a fast trot. There is a jog in Walnut street at Broadway, one block north of College avenue. Walnut street north of Broadway is about forty feet west of the point where it intersects the south line of Broadway, so that the west line south of Broadway is approximately the east line north of Broadway. When Arpagaus reached the corner, he turned west or to the left, intending, as it is presumed, to pursue his way north on Walnut street. There is testimony to show, and it is supported by the physical fact, that he did not drive straight across the car tracks, but drove to the south of the north or west-bound track. As he attempted to cross the track, his team was struck by one of appellant's street cars. He was thrown from his wagon and killed. This action was brought to recover damages. A verdict was rendered in favor of plaintiffs. The case was brought here upon appellant's challenge to the sufficiency of the evidence, the point being raised by a motion for a nonsuit, a motion for a directed verdict, motion *non obstante*, and for a new trial.

There is no evidence tending to show that the motorman was incompetent or that the car was driven at a faster rate of speed than allowed by the city ordinances. The trial judge held that there was no evidence sufficient to raise an issue as to the sounding of a gong or warning. There is no doubt that the usual warnings were given. So the only question remaining is whether, from a consideration of all the facts, the car was driven without regard for the rights of the decedent and the traveling public, and whether, if it was so negligently driven, Arpagaus was guilty of contributory negligence.

There is some testimony which, coupled with the physical facts, might be convincing to a jury, and, under the settled rule and the statute, we feel bound to say that the question

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of negligence was one for the jury, and that its verdict has foreclosed this question.

This brings us to the remaining question, whether the deceased was guilty of contributory negligence. Each side cites many cases to sustain its contention, but as we have so often said, authority is of little value in cases of this kind. Each case rests upon its own facts. These being established, it is a question of principle rather than cases.

The testimony on both sides shows that the car was making quite a noise as it came down the street. One of respondents' witnesses testified that, at the middle of the block, the motor-man sounded the emergency whistle, loud and long, and that he, having had experience on street cars, knew the meaning to be a danger alarm. There is also testimony that the gong was sounded at least a half a block away. There was a row of small trees in front of the houses on the south side of Broadway between Cedar and Walnut streets, but it is likely that Arpagauss could have seen the approaching car when twenty-five or thirty feet south of Broadway, had he looked. The seat of his wagon was five and one-half feet from the ground. Disregarding this possibility, all witnesses agree that, when he came opposite to the south curb of Broadway, he could have seen the car several blocks away. One witness testifies positively that Arpagauss turned north on Broadway and was south of the car track, and that he suddenly reined his horses to the right and in front of the car. Two others testify that he pulled the right line so as to swing his team directly in front of the car. All witnesses agree that he was turning at right angles after having gone some distance west on Broadway. The rate of speed at which he was driving is pertinent to the question of contributory negligence. If he was walking his team, or driving them at a slow trot, or jogging along, he must, if he had taken due care to look, have seen and heard the approaching car. If he was driving at a fast trot, he was equally negligent. To drive out of a cross-street and across a street car track at a fast or reck-

less gait is in itself negligence which will bar a recovery. Under this state of facts, both decedent and appellant being negligent, the question is, what was the proximate cause of the injury? What are the circumstances but for which the accident would not have happened? This involves an inquiry as to the relative rights of the drivers of vehicles and street cars. These rights are mutual and reciprocal. Each must have a due regard for the rights and safety of the other. Street cars, being operated upon fixed tracks, have in a sense a right of way over that part of the street upon which the tracks are laid. *Pantages v. Seattle Elec. Co.*, 55 Wash. 453, 104 Pac. 629. The motorman is entitled to act upon the assumption that a driver or a pedestrian will exercise due care for his own safety. It is not necessary for him to stop the car until he sees that the other is in apparent danger. *Duteau v. Seattle Elec. Co.*, 45 Wash. 418, 88 Pac. 755. And further, that traffic going parallel with a car track will not turn abruptly in front of a moving car. This we held in the recent case of *Briscoe v. Washington-Oregon Corporation*, 84 Wash. 29, 145 Pac. 995. We there said:

“By the great preponderance of the evidence, both for the appellant and for the respondent, it was shown that the appellant, without any care for his safety, drove his automobile upon the street car track immediately in front of the moving street car. Not only by the great weight of the evidence of the witnesses, of whom there were several, was this fact shown, but all the circumstances tended to show that the appellant carelessly and negligently drove his automobile in front of the approaching car, and that there was no time for the street car to be stopped and the accident avoided. The negligence of the plaintiff was clearly established. The only negligence claimed against the street car company was that the car was traveling at an excessive rate of speed. But whether it was or not, there was nothing in front of the appellant to obstruct his view. The street was open; the street car was in plain sight upon the track; and there can be no

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doubt of the fact that the proximate cause of the accident was the plaintiff's own negligence."

It was the duty of Arpagaus to look, to take some care for his own safety. It was his duty, also, knowing that the street car moved on fixed tracks, to drive straight across the track and then turn to the west on Broadway and then north into Walnut street. If he had done so, the accident would not have happened, for the testimony shows without question that he had gone a greater distance to the west or the northwest than he would have gone had he crossed the street as he should. Instead of doing that, he moved in a way that would naturally induce the belief that he intended to keep his course west, or intended to allow the car to clear him on his right. Arpagaus was traveling west on the wrong side of the street or making a cut diagonally to make the jog in Walnut street. Whichever it was, he was not in the place where the law of the road or common prudence required him to be. Such conduct was condemned in *Gifford v. Washington Water Power Co.*, 85 Wash. 341, 148 Pac. 11. Moreover, the physical facts give added weight to the conclusion that Arpagaus turned his team in front of the car so abruptly as to make the accident inevitable. The "off-horse," the one on the right side, was struck on the side just behind the shoulder. It was the judgment of the officer who arrived soon after the accident that the ribs were broken. The other horse was not hurt. The wagon was not materially injured; it was not put out of commission. A step on the hound was bent. The brake rod and guard were also slightly bent. The horses were pushed ahead a distance of thirty to sixty feet, as the distance is estimated by the witnesses, while the car was being stopped. Scars on the side of the car indicate that the slight damage to the wagon came from this contact and not from the first impact, which, as we have said, must have been received by the horse.

It seems to us that the case falls within the rule announced in *Stueding v. Seattle Elec. Co.*, 71 Wash. 476, 128 Pac.

1058; *Slipper v. Seattle Elec. Co.*, 71 Wash. 279, 128 Pac. 233, and *Bowden v. Walla Walla Valley R. Co.*, 79 Wash. 184, 140 Pac. 549. Counsel seeks to distinguish the first two of these cases by saying that they are a "pedestrian case." We do not understand that pedestrians are held to a higher primary duty to exercise due care for their own safety than are drivers of vehicles. In either case, if the facts show a want of due care but for which the accident would not have occurred, a plaintiff cannot recover.

Neither does the case fall within the rule of wilful and wanton injury, the rule announced in *Gladden v. Seattle*, 83 Wash. 412, 145 Pac. 418. In such cases a recovery is allowed because of evidence that the defendant knew, or should have known, the situation of the plaintiff, and should have controlled the agency in his keeping until the plaintiff had extricated himself. Such a case would be presented if Arpagaus had been driving on the track. His danger would then have been known and appreciated. Until the moment of the collision there was nothing, at least nothing appears in the testimony, to indicate that Arpagaus intended to pull across the track. Some of plaintiffs' witnesses testify that, in their judgment, the front of the car hit the hub of the right front wheel. These witnesses were one hundred feet or more from the place the accident occurred; but if we grant that the car did strike the wagon, it only emphasizes the fact that Arpagaus, after proceeding west on the wrong side of the street, made a square turn in front of the street car at a time when it was in hearing and seeing distance. The testimony will not sustain an inference that the motorman should have anticipated any danger to Arpagaus until he started across the track.

Respondents rest their case, and seek to distinguish our many decisions, upon the premise that Arpagaus was driving squarely across the track, whereas, it is certain that he was going west on the wrong side of the street until he abruptly turned. His own conduct was an invitation to the street car

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to pursue its way, or, if not, if he had taken any precaution he could have seen or heard the car. Like in the case of *Hellesen v. Seattle Elec. R. Co.*, 56 Wash. 278, 105 Pac. 458, if he had been slower by a few seconds he would have driven his team into the side of the car.

These cases are unfortunate, but we cannot measure the law by the consequences of the accident. Had the horse alone been killed, or the damage to the wagon been all the injury sustained, we think it would not be seriously contended that a recovery ought to be sustained.

Our conclusion is that the accident would not have occurred but for the contributory negligence of the deceased.

MORRIS, C. J., MOUNT, and PARKER, JJ., concur.

HOLCOMB, J. (dissenting)—I dissent. I think the question of whether deceased was guilty of contributory negligence, under the facts recited in the majority opinion, clearly demonstrates that that question was one of fact for the jury, and cannot be resolved as a question of law for the court.

[No. 12742. Department Two. June 16, 1915.]

THE STATE OF WASHINGTON, *on the Relation of John Prentice et al., Plaintiff, v. THE SUPERIOR COURT FOR FRANKLIN COUNTY et al., Respondents.*¹

PROHIBITION—TO COURTS—GROUNDS—JURISDICTION. Prohibition does not lie to prevent the superior court from entering judgment where it has jurisdiction of the subject-matter of the action and there is an adequate remedy by appeal or writ of error; but only where the court is proceeding or threatening to proceed without or in excess of jurisdiction.

COURTS—SUPREME COURT—ORIGINAL JURISDICTION—PROHIBITION—AMOUNT IN CONTROVERSY. The supreme court has no jurisdiction to control, by writ of prohibition, the superior court in an action in which the superior court has jurisdiction of the subject-matter, where the amount involved is less than \$200, and the case does not fall within any of the exceptions to the limitation of the jurisdiction of the supreme court contained in Const., art. 4, § 4.

JUDGMENTS—VACATION—EQUITABLE RELIEF—LIMITATIONS. The superior court has jurisdiction, upon a proper showing, to grant relief in equity against a judgment, after the expiration of one year from the date of its entry.

PROHIBITION—TO COURTS—GROUNDS—ERRONEOUS EXERCISE OF JURISDICTION. Whether sufficient equitable grounds are stated in a cross-complaint for equitable relief against a judgment, or are shown by the evidence, are questions, in the first instance, within the jurisdiction of the trial court, reviewable only by appeal; hence prohibition does not lie to prevent such action as being beyond the jurisdiction of the court.

JUDGMENTS—RES JUDICATA—DISMISSAL—MERITS. The dismissal of an appeal upon the ground of cessation of the controversy, without passing on the merits or affirming the judgment, either in the opinion or in the remittitur, is not an affirmance of the judgment or an adoption of it so as to make it a judgment of the supreme court, or *res judicata* or immune from attack or interference in the lower court.

Application filed in the supreme court April 5, 1915, for a writ of prohibition to the superior court for Franklin

¹Reported in 149 Pac. 321.

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county, Linn, J., to prevent the vacation of a judgment. Denied.

Driscoll & Leonard, for relators.

A. J. Elrod, for respondents.

ELLIS, J.—The relator, John Prentice, as plaintiff, on October 13, 1906, commenced an action against Franklin county and its treasurer seeking to vacate and set aside certain tax foreclosure proceedings. On January 14, 1907, the parties stipulated that the tax foreclosure proceedings against the property of the plaintiff be set aside; that the plaintiff pay to Franklin county the sum of \$2,000 in full of all taxes, interest and penalties upon the property to date; that the decree in the cause should be entered within three days after being signed by the judge; that the \$2,000 should be paid within twenty days after the decree was filed; and that, upon such payment, or demand thereafter, the county should make a quitclaim deed of the property to the plaintiff. This stipulation was executed by both the plaintiff and his attorney, and by the county commissioners and prosecuting attorney of Franklin county. Thereafter the county commissioners attempted to revoke the stipulation and moved to withdraw it, claiming that it had been obtained by fraud and mistake. The motion was resisted, a complete hearing on evidence was had, and on June 13, 1908, a decree was entered, reading in part as follows:

“Wherefore, it is adjudged, considered and decreed, that that certain judgment and decree of foreclosure made and dated June 24, in 1902 and entered and filed in the superior court of Franklin county, state of Washington, by said court on the 28th day of June, 1902, . . . is hereby, set aside, annulled, and held for naught, . . . and it is further adjudged, considered, and decreed that plaintiff pay the sum of two thousand dollars to the treasurer of Franklin county, within twenty days after the filing of this decree with the clerk of this court, which when paid, will be in full of all taxes, interest and penalties upon and against said property

to date, and upon the receipt of said money, said treasurer shall forthwith enter said taxes against each piece, parcel, lot and block of said property as fully paid and satisfied to date, and the said county of Franklin through its county commissioners and proper officers shall within the said twenty days cause to be executed and to execute a quitclaim deed of said described property to said John Prentice, . . .”

The county perfected an appeal from that decree to this court, but on July 8, 1908, the county commissioners entered an order in effect abandoning the appeal and directing a discontinuance and dismissal of all proceedings looking to an appeal from or review of the decree. The plaintiff paid the \$2,000 and received a receipt therefor, and subsequently the auditor of the county executed a quitclaim deed of the property to plaintiff. Upon motion of Prentice, this court dismissed the appeal on the ground that the controversy had ceased. *Prentice v. Franklin County*, 54 Wash. 587, 103 Pac. 831.

In November, 1911, the defendant, Franklin county, taxed the property involved in the former litigation in the sum of \$146.70 for the year 1908. The relator, Prentice, paid these taxes under protest. Prentice having assigned to N. R. Sylvester his claim against Franklin county for reimbursement, Sylvester brought an action to recover the money so paid. The defendant Franklin county filed a cross-complaint making Prentice a party, and alleging that the judgment of June 13, 1908, should have read as of the date of the stipulation of January 14, 1907; that it was in excess of the court's authority and void; that if not void, it was entered by mistake or fraud, and should be reformed and amended so as to conform to the stipulation upon which the judgment was based. Prentice and the other plaintiffs contested the jurisdiction of the court to vacate or modify the judgment. Upon the issues framed, the trial court rendered a written decision indicating an intention to grant the prayer of the cross-complaint, on the ground that the judgment of June 13, 1908, should be modified and vacated so as to take effect as

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of the date of the stipulation, January 14, 1907, instead of June 13, 1908. The plaintiffs, as relators, have applied to this court for a writ prohibiting the threatened action of the trial court. An alternative writ was issued. The question now is, shall it be made permanent?

The respondents, by way of demurrer to the application and affidavit, and for answer to the alternative writ, contend upon many grounds that the permanent writ should be denied. We find it necessary to consider only two of these grounds. They are these: (1) That the application for the writ shows upon its face that the superior court was proceeding within its jurisdiction, and having jurisdiction, its decision would be final, and if erroneous, the relators have an adequate remedy by appeal, if the original action is one involving the validity of the tax. (2) That it appears upon the face of the application that the original action was a civil action for the recovery of money not exceeding the sum of \$200, and not involving the validity of a tax or assessment within the meaning of art. 4, § 4 of the state constitution; that the superior court was proceeding within its jurisdiction, and that in such a case the writ of prohibition is not available as a substitute for appeal; that this court, therefore, has no jurisdiction to issue the writ.

We find it unnecessary to decide whether the action, the judgment in which is sought to be prohibited, is a mere civil action for the recovery of money not exceeding \$200, hence not appealable, or an action involving the validity of a tax, hence appealable—though it would seem to be the latter. In either event, under our decisions, prohibition will not lie where the superior court has jurisdiction of the subject-matter of the action. This court has repeatedly held that, where the superior court has jurisdiction of the subject-matter in controversy, prohibition will not lie to prevent an erroneous exercise of such jurisdiction, where there is an adequate remedy by appeal or writ of review. The writ is not issued to prevent the commission of mere error, nor to take the place

of an appeal, or perform the office of a writ of review for the correction of error. The writ will only issue to inferior courts where they are proceeding, or threatening to proceed, without, or in excess of, their jurisdiction.

"The writ of prohibition will not be issued as of course, nor because it may be the most convenient remedy. Nor will it be allowed to take the place of an appeal, or perform the offices of a writ of review. It is a preventive remedy, and as such is bounded by rigid rules, and is only issued in cases of extreme necessity. The remedy is employed only to restrain courts and inferior tribunals exercising judicial functions from acting without or in excess of their jurisdiction; and, if the court or tribunal sought to be restrained has jurisdiction of the subject-matter in controversy, a mistaken exercise of its acknowledged powers will not justify the issuance of the writ." *State ex rel. Lewis v. Hogg*, 22 Wash. 646, 62 Pac. 143.

See, also, *State ex rel. Baldwin v. Superior Court*, 11 Wash. 111, 39 Pac. 818; *State ex rel. Vincent v. Benson*, 21 Wash. 571, 58 Pac. 1066; *State ex rel. Cann v. Moore*, 23 Wash. 115, 62 Pac. 441; *State ex rel. Foster v. Superior Court*, 30 Wash. 156, 70 Pac. 230, 73 Pac. 690; *State ex rel. Stetson & Post Mill Co. v. Superior Court*, 32 Wash. 498, 73 Pac. 479; *State ex rel. Twigg v. Superior Court*, 34 Wash. 643, 76 Pac. 282; *State ex rel. Goupille v. Superior Court*, 41 Wash. 128, 83 Pac. 14; High, Extraordinary Legal Remedies, § 772.

This court has also held that, when the amount involved is less than \$200, and the case does not fall within any of the exceptions to the limitation of our jurisdiction to cases in excess of that amount contained in art. 4, § 4, of the constitution, the extraordinary remedies of prohibition and mandamus will not lie, either to prohibit the superior court from assuming jurisdiction when it has none, or to compel the superior court to exercise a jurisdiction which it has. This on the ground that the jurisdiction of this court in the issuance of the writs of mandamus and prohibition must be construed

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as subject to the same constitutional limitation as in other cases where the amount in controversy is less than \$200. From the nature of the remedies, prohibition is the counterpart of mandamus, and the same rule must therefore apply to both. *State ex rel. Fuller v. Superior Court*, 31 Wash. 96, 71 Pac. 722; *State ex rel. Cleek v. Tallman*, 38 Wash. 132, 80 Pac. 272; *State ex rel. McIntyre v. Superior Court*, 21 Wash. 108, 57 Pac. 352; *State ex rel. Wallace v. Superior Court*, 24 Wash. 605, 64 Pac. 778; *State ex rel. Plaisie v. Cole*, 40 Wash. 474, 82 Pac. 749; *State ex rel. Ide v. Coon*, 40 Wash. 682, 82 Pac. 993. In this connection, it may be remarked that the dictum found in the last paragraph of the opinion in *State ex rel. Foster v. Superior Court*, *supra*, to the effect that this rule applies to prohibition only where the court is acting within its jurisdiction and there is no appeal, is impliedly disapproved in the later case of *State ex rel. Fuller v. Superior Court*, *supra*, which follows Judge Dunbar's concurring opinion in the *Foster* case. In either view of the matter, therefore, the sole question necessary to a disposition of this application is this: Did the superior court have jurisdiction of the subject-matter of the action? If it did, the writ must be denied.

The relators' first claim is that the superior court was without jurisdiction to modify the judgment of June 13, 1908, because more than a year has expired since its rendition. However tenable this position might prove upon appeal from the order modifying the judgment, it is clear that it cannot be considered in this proceeding. It confounds error with excess of jurisdiction. The respondent, Franklin county, by its cross-complaint, sought a modification of the judgment upon equitable grounds. As said by this court, speaking through Judge Rudkin, in *Anderson v. Burgoyne*, 60 Wash. 511, 513, 111 Pac. 777:

"This court has adopted the general rule that a party may obtain relief in equity against a judgment, after the expira-

tion of a year from the date of its entry, if proper grounds for equitable interposition are shown."

See, also, *Long v. Eisenbeis*, 18 Wash. 423, 51 Pac. 1061; *State ex rel. Boyle v. Superior Court*, 19 Wash. 128, 52 Pac. 1013, 67 Am. St. 724; *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757; *State ex rel. Post v. Superior Court*, 31 Wash. 53, 71 Pac. 740.

Whether its cross-complaint stated sufficient grounds, and whether its evidence established sufficient facts for that purpose, were questions addressed in the first instance to the superior court, and reviewable here only upon appeal or by writ of review. To hold otherwise, would be, in effect, to say that this court will entertain prohibition to review the action of the trial court in every case where it has refused to sustain a demurrer or to grant a nonsuit.

The relators ask what difference there is between this case and *State ex rel. Wood v. Superior Court*, 76 Wash. 27, 135 Pac. 494. The answer is that jurisdiction in that case, a will contest, was conferred by a special statute which was not observed. It is also asked what is the difference between this case and *State ex rel. Alladio v. Superior Court*, 17 Wash. 54, 48 Pac. 733; *State ex rel. Puyallup v. Superior Court*, 50 Wash. 650, 97 Pac. 778, and *State ex rel. Arthur v. Superior Court*, 58 Wash. 97, 107 Pac. 876. The answer is that, in the first of those cases, the court was proceeding without having acquired jurisdiction of either parties or subject-matter. In the second, the application was treated as invoking a review on the merits by certiorari because of the inadequacy of the remedy by appeal. This was also the mode of treatment indulged in the recent case of *State ex rel. Pacific Loan & Inv. Co. v. Superior Court*, 84 Wash. 392, 146 Pac. 834, where the application for prohibition asked for a review by certiorari in the alternative. In the *Arthur* case, the court was proceeding against a person not a party to the action.

Finally, it is contended that, by the dismissal of the appeal by this court in the first action of *Prentice v. Franklin*

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County, 54 Wash. 587, 103 Pac. 831, this court affirmed the judgment of the superior court of June 13, 1908, which thereby became the judgment of this court, and that the trial court thereafter had no power in the premises except to carry out that judgment. This claim proceeds upon a misconception of the force of the dismissal of the appeal. That dismissal was in no just sense an affirmance of the judgment appealed from. Neither the opinion nor the remittitur contained any affirmance of that judgment, or in any manner adopted it as the judgment of this court. Neither the opinion nor the remittitur directed the entry of a judgment even for costs. By the dismissal, this court merely cleared its records of an appeal which it found had been abandoned. To illustrate the difference between a mere dismissal and an affirmance, let us suppose that this dismissal had taken place before the expiration of the statutory period in which an appeal may be taken, could it be successfully asserted that the county would have been precluded thereby from taking a new appeal at any time before the expiration of the statutory period? Assuredly not, and for the simple reason that, by the dismissal, we neither affirmed nor reversed the judgment of the lower court nor passed upon the merits, but only found that the original appeal had been abandoned.

The relators assert that the following decisions sustain their contention: *Pacific Drug Co. v. Hamilton*, 76 Wash. 524, 136 Pac. 1144; *Kath v. Brown*, 53 Wash. 480, 102 Pac. 424, 132 Am. St. 1084; *German-American State Bank v. Sullivan*, 50 Wash. 42, 96 Pac. 522; *State ex rel. Jefferson County v. Hatch*, 36 Wash. 164, 78 Pac. 796; *Cochran v. Van de Vanter*, 13 Wash. 323, 43 Pac. 42; *State ex rel. Wolferman v. Superior Court*, 8 Wash. 591, 36 Pac. 443; *State ex rel. Wolferman v. Superior Court*, 7 Wash. 234, 34 Pac. 930. An examination of these cases discloses the fact that, in every one of them, there was either an express affirmance of the judgment by this court, or an express entry of

judgment on the merits by this court. They sustain the doctrine that, in such cases, no interference with such judgments by any proceeding in the same cause in the lower court will be tolerated, except by direction or leave of this court. Though none of these decisions presents a case of prohibition, it may be assumed that, in order to protect or preserve its own judgments, this court, in aid of its own jurisdiction, will, in a proper case, prohibit an interference with such judgments. That, however, is not the case here. The only judgment this court has ever rendered touching this case was a judgment of dismissal not touching the merits, not affirming or passing upon the correctness of the judgment of the lower court, but merely clearing our own records of an abandoned appeal. It may be that the prior judgment of the superior court is *res judicata* of the questions sought to be raised by cross-complaint in the new suit. It may be that the cross-complaint for other reasons states no cause of action. The trial court, however, has jurisdiction of the subject-matter and of the parties. Its judgment, if reviewable at all, is adequately reviewable by appeal. To grant the writ on the record here would warrant the entertainment of prohibition as a short cut for reviewing judgments of the superior court in almost any case. The temporary writ is quashed and a permanent writ denied.

MORRIS, C. J., FULLERTON, MAIN, and CROW, JJ., concur.

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[No. 12271. Department Two. June 17, 1915.]

YAKIMA CENTRAL HEATING COMPANY, *Respondent*, v.
NORTH YAKIMA, *Appellant*.¹

MUNICIPAL CORPORATIONS—TORTS—DAMAGES FROM FLUMES—NATURAL CONDITIONS. A city is not liable for damages to the pipe lines of a heating company caused by leakage from wooden flumes used by the city for irrigation of its parking system, where the damage was the result of natural conditions known to the heating company at the time it obtained its franchise to tunnel beneath the flumes.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered April 15, 1914, upon findings in favor of the plaintiff, in an action for damages, tried to the court. Reversed.

Guy O. Shumate, for appellant.

Fred Parker, for respondent.

MORRIS, C. J.—Respondent brought this action to recover damages to its pipe lines, claimed to have been caused by leakage from wooden flumes used by the city in conveying water across certain alleys. These flumes were part of the park system of the city, being used in conveying water for the purpose of irrigation of the trees, grass plats and parking strips within the confines of the streets, and had been so used by the city for many years prior to 1910, when, under a franchise from the city, respondent excavated underneath these flumes four or five feet in depth and laid its steam pipes; the injury claimed being that water seeped down from the flumes upon the steam pipes and caused excessive condensation. Judgment went against the city and it appeals.

It is contended in support of the judgment that the city in so conveying this water is acting in its private and not its governmental capacity, and must respond in damages for the injuries suffered; reliance being placed upon two cases from

¹Reported in 149 Pac. 341.

this court, *Hayes v. Vancouver*, 61 Wash. 536, 112 Pac. 498, and *Vittucci Importing Co. v. Seattle*, 72 Wash. 192, 130 Pac. 109. Neither of these cases will sustain liability against the city. In the *Vancouver* case, it was held that a city is liable for damages resulting to a property owner by flooding his premises in pumping water into a sewer in an endeavor to remove an obstruction, the reasoning being that the act was a direct trespass for which liability would rest upon the city upon the same principle as if the act had been performed by a private individual, the duty of the city to keep its sewer in repair being a ministerial and not a governmental duty, for the breach of which an action will lie. This doctrine was first announced in *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847, and has been uniformly followed. *Hewitt v. Seattle*, 62 Wash. 377, 113 Pac. 1084, 32 L. R. A. (N. S.) 632. In the *Vittucci Importing Co.* case, it was held that a city owes to property owners the duty of a reasonable inspection of its sewers, and is liable for damages caused by obstructions and overflow. Referring to this duty, it was there said:

"It is well settled that a municipal corporation is not an insurer of the condition of its sewers, and that, to charge it with damages occasioned by an obstruction therein, negligence must be shown. This proposition is not controverted. It is so well known as not to require the citation of authority in its support."

The injury here sustained was not caused by any direct or positive act of the city or its servants, nor was it the result of negligence in original construction, but, so far as we are advised by the record, it was the result of natural conditions, the probability of which was as well known to respondent at the time it obtained its franchise to tunnel beneath these flumes as it was to the city, and for the happening of which it must be held to have accepted the risk. When respondent uncovered its pipes to repair them, it was found that the flumes had sagged and leaked, permitting the water to perco-

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late down and upon the steam pipes. It is admitted that the soil underneath the flumes is of a gravelly and porous nature, and it is further shown that respondent's construction was in the winter and spring when the ground was frozen, and that it would be impossible to fill and tamp this frozen ground so that when thawed it would not settle underneath the flumes. It is also shown that the effect of the excavation beneath the flumes would have a tendency to cause the flumes to settle and sag. This, it seems to us, establishes the fact that respondent's injury was the result of natural conditions which it was its duty to guard against, and not having done so, it cannot fasten liability upon the city for the happening of that which was a natural result and should have been anticipated. These facts determine the rule of nonliability upon the part of the city for the injury suffered by respondent.

The case being determined upon the facts, we refrain from any discussion of the question as to whether the city in the construction and maintenance of these flumes acts in a proprietary or governmental capacity, as such determination is not necessary to the final disposition of the case.

The judgment is reversed, and the cause remanded with instructions to dismiss.

CROW, MAIN, ELLIS, and FULLERTON, JJ., concur.

[No. 11836. Department Two. June 21, 1915.]

MILWAUKEE TERMINAL RAILWAY COMPANY, *Appellant*, v.
THE CITY OF SEATTLE, *Respondent*.¹

APPEAL—DECISION—LAW OF CASE—DICTA. Where two issues are presented, decided by the supreme court, the decision on one issue cannot be said to be *dictum* merely because the decision might have rested on the other.

EMINENT DOMAIN—TAKEN OR DAMAGED. The right to make a fill and slope upon lands abutting on a street, is a "damaging" of the property, as distinguishable from a "taking," as used in Const., art. 1, § 16; since where both terms are used, "damaged" covers injuries where there is no direct taking of the land itself.

SAME—COMPENSATION — DAMAGES — EVIDENCE — SUFFICIENCY. In eminent domain proceedings to condemn the right to fill abutting lands to support a street, in which the court instructed the jury that, in determining the damages, it must be assumed that the defendant would have no right to remove the fill, evidence of two experts that there would be no damage, based on the assumption that the defendant could remove the fill, is insufficient to sustain a verdict of no damages, as the instruction became the law of the case; especially where defendant's evidence showed actual damages in a substantial sum, and the city filed no stipulation conferring upon the defendant the right to excavate the fill and support the street by a retaining wall or abutment.

Appeal from a judgment of the superior court for King county, French, J., entered September 22, 1913, upon a verdict of no damages, in proceedings to condemn property for a public improvement. Reversed.

F. M. Dudley and *G. W. Korte*, for appellant.

James E. Bradford and *Ralph S. Pierce*, for respondent.

Crow, J.—This is a proceeding in eminent domain, instituted by the respondent, city of Seattle, against the appellant, Milwaukee Terminal Railway Company, a corporation, to condemn the right to damage real estate for the purpose of raising the grade of Shilshole avenue. Appellant's prop-

¹Reported in 149 Pac. 644.

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erty, which lies 2.7 feet below the grade of Shilshole avenue, is occupied by a railway track, and consists of a strip of land 15 feet in width, abutting 150 feet in length on the avenue. The city proposes to raise the avenue eleven feet above its present grade, or 13.70 feet above the present surface of appellant's land, making it necessary to construct a slope or fill on appellant's land to support the street when raised. The fill will cover appellant's land to a depth of 13.70 feet along the edge of the avenue, and to a depth of 3.70 feet at the opposite side, 15 feet distant. Upon trial, the jury returned a verdict of no damages, upon which a judgment of condemnation was entered, awarding the city the right to construct the slope or fill. From this judgment, the railway company has appealed.

When ruling upon the admissibility of evidence, the trial judge held that the right to construct the slope, which the city sought to condemn, was a damaging of appellant's property as distinguished from a taking, and appellant's principal contention, predicated on numerous assignments of error, is that the trial judge erred in so holding, for the reason that the construction of the fill and slope is a taking of its property. In support of this contention, appellant argues that *Swope v. Seattle*, 36 Wash. 113, 78 Pac. 607, *Compton v. Seattle*, 38 Wash. 514, 80 Pac. 757, and *Donofrio v. Seattle*, 72 Wash. 178, 129 Pac. 1094, which the trial judge followed in making his ruling, are unsound, and contrary to previous decisions of this court and to the great weight of authority, and that language therein contained, in so far as it seems to support the ruling of the trial court, is dictum.

In *Swope v. Seattle*, *supra*, we sustained the trial court in holding that the construction of a slope on plaintiffs' property, by removing soil therefrom so as to prevent the earth from sliding into the street, was a damaging as distinguished from a taking, and further said:

"But, even if it was not, we fail to see how plaintiffs were prejudiced, inasmuch as it was for the jury to determine,

from all the facts and circumstances in evidence, the 'just compensation' to which the plaintiffs were entitled by reason of the *acts* and *doings* of the defendants."

So here, we might say that it would perhaps be immaterial whether making the fill and slope on appellant's land would be a taking or a damaging, so long as a jury properly assessed and awarded to appellant just compensation for the acts and doings of respondent. Appellant has, however, devoted the major portion of its brief to a discussion of the question whether its property is being taken or damaged, and we will consider the question thus raised.

In the *Compton* case, the plaintiffs sought to enjoin the city from constructing a slope by the removal of soil from their lots, for the purpose of preventing the lots from falling into the street. They contended that the removal of the earth and the construction of the slope was taking their property as distinguished from damaging. In a former action the city had condemned the right to take a portion of the lots to widen the street, paying \$200 therefor, and had also condemned the right to damage another portion not taken, by constructing a slope thereon, paying \$1,800 compensation therefor. The judgment in this condemnation proceeding was pleaded by the city as a former adjudication in defense of plaintiffs' injunction suit. The defense of *res judicata* was thus involved, as also was the question whether the construction of the slope was a taking of plaintiffs' property or a damaging only. Language in the opinion, which appellant quotes in its brief, indicates that our decision could have been predicated on the defense of *res judicata* alone, but the question whether the construction of the slope was a taking or a damaging was also an issue in the case clearly raised by the pleadings. Passing on this question, we said:

"Formerly in the constitutions of most of the states, the word 'damage' did not occur, but '*taking*' only was mentioned. Under such constitutions, many courts of the Union, in order to do justice and prevent what might otherwise be

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held to be merely *damnum absque injuria* in the eyes of the law, frequently extended the meaning of the word 'taking' beyond its original and strict construction, and applied it to almost any act by which the land of an individual, although not physically taken, sustained a special injury, decreasing its value. The word 'damaged,' or its equivalent, has, however, during later years been incorporated in the constitutions of many states and is found in our constitution, in § 16, art. 1. This word certainly has some meaning, as distinguished from the word 'taken.' In *Swope v. Seattle*, *supra*, Anders, J., used the following language: 'It appears from the bill of exceptions, as we interpret it, that the plaintiffs claimed at the trial that the removal of the soil taken from the plaintiffs' premises in sloping the margins thereof constituted a taking of property in contemplation of the constitution, and that they were entitled to recover the actual value to them of the earth so removed, together with the damage to the land not taken, which would be caused by the grading of the streets. The court, however, seems to have ruled that the effect of what the defendants were doing was simply a damage to the plaintiffs' property. And we are inclined to think that the court's ruling was correct.' "

Under the issues presented, we fail to understand how this language can be regarded as dictum. As we observed in *Savage v. Ash*, *ante* p. 43, 149 Pac. 325:

"It may be that the case could have been rested on the first ground suggested in the opinion, namely, that the fraud alleged was not proven, but both questions were clearly in the case, and simply because the court decided both does not necessarily mean that the one or the other is dictum."

Whether the language above quoted was dictum or not, we now adhere to the doctrine announced in the *Swope*, *Compton*, and *Donofrio* cases.

In support of its contention that the construction of the slope will be a taking and not a damaging, appellant cites numerous cases from other jurisdictions, including the following, which are the principal ones supporting its position: *Vanderlip v. Grand Rapids*, 73 Mich. 522, 41 N. W.

677, 16 Am. St. 597, 3 L. R. A. 247; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Broadwell v. Kansas City*, 75 Mo. 218, 42 Am. Rep. 406; *Tegeler v. Kansas City*, 95 Mo. App. 162, 68 S. W. 953; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Mosier v. Oregon Nav. Co.*, 39 Ore. 256, 64 Pac. 453, 87 Am. St. 652; *Stearns v. Richmond*, 88 Va. 992, 14 S. E. 847, 29 Am. St. 758. The case last cited, *Stearns v. Richmond*, was decided in 1890, before the Virginia constitution was revised in 1902 so as to include the words "or damaged." An examination of the other cases discloses the fact that they are from jurisdictions where the state constitutions provide only for a taking of property, and do not use the word "damaged" which appears in our constitution, nor other words of similar meaning. In *Vanderlip v. Grand Rapids*, *supra*, the opinion quotes § 14, art. 18, of the Michigan constitution as follows: "The property of no person shall be taken for public use without just compensation therefor." The Missouri constitution, art. 1, § 16, quoted in *Broadwell v. Kansas City*, *supra*, provides that: "No private property ought to be taken or applied to public use, without just compensation." The cases which appellant cites, and many others that might be cited, arise under constitutions which use the word "taking," but do not use the word "damaged" found in our constitution. In such cases, the courts, for the purpose of securing justice to owners whose private property had been damaged, applied a broader and more liberal construction to the word "taking" than is necessary in construing our constitution. To accomplish this end, many courts, in construing the word "taking" when used alone, have held that any direct or special injury tending to depreciate the value of private property was a taking, and that the owner was entitled to compensation therefor, thus avoiding an application of the harsh rule of *damnum absque injuria*. It was to avoid the necessity of this liberal construction of the word "taking," and at the same time preserve the rights of owners of private property that, in 1870,

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the state of Illinois changed the wording of its constitution so as to include the words "or damaged;" and other constitutions, including our own, which have been adopted since that time, include both terms, "taken" and "damaged." Where both terms are included, the word "damaged" should be held to cover injuries to property where there is no direct taking of the land itself; that is, where the owner is not deprived of title to any of the land, but where the land has been so injured or damaged as to cause a direct loss to the owner. In this case, appellant still owns the fee of the land over which the slope is to be constructed, and can convey the same, or make any use of it which it may desire, subject to the right of the city to maintain the slope.

Appellant insists that our holding in the *Swope*, *Compton*, and *Donofrio* cases is in conflict with *Parke v. Seattle*, 5 Wash. 1, 31 Pac. 310, 32 Pac. 82, 34 Am. St. 339, 20 L. R. A. 68. The *Parke* case was decided on facts which arose before the adoption of our constitution, and its holding was in line with the leading cases above mentioned, to the substantial effect that an excavation of a street by a city, which caused plaintiff's abutting property to slide into the street, was a taking and an injury for which just compensation should be awarded. Our conclusion is that the trial judge properly held that the right which the city seeks to condemn is a damaging as distinguished from a taking.

Although in this action the city condemned the right to construct a slope which will cover all of appellant's land to a depth varying from 3.70 to 13.70 feet, it has done so without any damages being awarded. This is a peculiar situation, the reason for which appears from an examination of the record. The trial court instructed the jury as follows:

"You are instructed that, in considering the damages, you should not assume that the defendant has the right to excavate or remove any slope which the city, by the payment of the judgment to be entered herein, would acquire the right to place upon defendant's property. It would have no such

right, and it will be your duty to assume, in considering the damages to be awarded, that the city will construct and retain the slope which it seeks in this action to secure the right to construct upon defendant's land."

This instruction, doubtless given at appellant's request, was the law of the case, and should have been controlling upon the jury. The only evidence offered by the city upon which a verdict of no damages could be returned was given by two witnesses, a Mr. Bruskevith and a Mr. Denny, real estate agents, who testified as experts. They each testified that the appellant's property would not suffer any gross damage because of the change of the grade contemplated in this improvement, or because of the construction of the slope. An examination of their testimony, however, shows that each predicated his opinion upon the assumption that the appellant would have the right to remove the slope thus constructed, and would thereby obtain the benefit of a basement under any building which might be erected upon its land. The jury were instructed that appellant could not remove the slope. The evidence of these witnesses, therefore, being predicated upon the theory that the appellant could remove the slope, was not sufficient to sustain a finding to the effect that the appellant sustained no damages; especially in view of the fact that the appellant presented witnesses who testified that its gross damage would be from \$3,500 to \$4,500.

Appellant interposed a motion to strike the testimony of the witnesses Bruskevith and Denny, and now contends that the trial court erred in denying the same. In view of the instruction above quoted, which became the law of the case, it would seem that this contention should have been sustained. The evidence objected to, if true, was in conflict with the theory upon which the case was tried, and could not possibly sustain a verdict of no damages. Respondent in its brief apparently concedes to appellant the right to remove the slope at any time it may see fit to do so, provided that appellant shall construct a retaining wall to support the street as

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raised. Appellant strenuously insists that it cannot interfere with the slope; that the city may prohibit it from removing the same even though a lateral support be provided by a retaining wall or abutment. In support of this contention, appellant cites *Village of Haverstraw v. Erickson*, 124 App. Div. 18, 108 N. Y. Supp. 506, afterwards affirmed in 192 N. Y. 54, 84 N. E. 578, 20 L. R. A. (N. S.) 287, where an injunction was allowed to prevent an abutting property owner from excavating his property and removing the lateral support of a highway. This case scarcely touches the point here involved. In *Bunker v. Hudson*, 122 Wis. 43, 99 N. W. 448, the right of an abutting owner to remove the slope and substitute a retaining wall was apparently recognized, but it was held that, in any event, he must furnish lateral support to the street, and could remove the slope only at his peril. In *Tegeler v. Kansas City*, *supra*, the court upheld an instruction to the effect that the jury should allow as a measure of damages "the diminution in the market value of the property, unless they found the cost of removing the dirt and building a retaining wall should be less, in which case the latter should be the measure of damages." This was a case where soil deposited by the city in raising the grade of an alley had covered a portion of plaintiffs' lot and had destroyed their fence. Although we find but little authority directly upon this question, it would seem that, when the city condemns the right to construct and maintain slopes upon appellant's land, appellant would not have the right to remove the slope without the consent of the city. It might be that, in the trial of the condemnation action, for the purpose of decreasing appellant's damages, respondent might have filed a stipulation to the effect that it would permit the appellant to remove the slope at any time it saw fit to do so, upon condition that appellant would construct and maintain a sufficient retaining wall or abutment to retain the street at the level to which it had been raised.

In view of the fact that the city has condemned the right to construct and maintain the slope upon appellant's land, and that no stipulation was made in the case conferring upon the appellant the right to excavate the slope at any time and support the street by a retaining wall or abutment, it would seem that there was no evidence to sustain the verdict of the jury that the appellant sustained no damages, especially in the light of the evidence adduced on behalf of the appellant to the effect that it was damaged.

The appellant interposed a motion for a new trial, one ground being that the evidence was insufficient to sustain the verdict, and now assigns error on the failure of the trial court to sustain its motion. For the reasons above stated, it would seem that this motion should be sustained, and that the trial court erred in denying the same. The judgment is reversed, and the cause remanded for a new trial.

MORRIS, C. J., FULLERTON, MOUNT, and PARKER, JJ.,
concur.

[No. 12138. *En Banc*. June 21, 1915.]

HARRY H. CLARK, *Respondent*, v. A. C. ELLINGTON *et al.*,
Appellants.¹

APPEAL AND ERROR—REVIEW—DISCRETION—GRANT OF NEW TRIAL. Under Rem. & Bal. Code, §§ 398, 399, authorizing a new trial after a trial by a jury, court, or referees and the setting aside of the verdict or other decision, it is discretionary to grant a new trial in an action at law tried to the court, which discretion will be reviewed only for abuse, where questions of law only are not involved.

NEW TRIAL—MOTIONS—RECORD. The purported denial of a motion for a new trial, before the motion was made or the findings entered or signed, does not preclude a motion for a new trial within the statutory time which did not commence until the findings were filed.

Appeal from an order of the superior court for King county, Humphries, J., entered March 10, 1914, granting a

¹Reported in 149 Pac. 350.

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new trial, after a judgment entered upon findings in favor of the defendants, in an action in tort, tried to the court. Affirmed.

James G. Raley and Otis W. Brinker, for appellants.

Green & Chester, for respondent.

PARKER, J.—The plaintiff seeks recovery from the defendants for personal injuries claimed to have resulted to him from their negligence. The case was, by consent of the parties, tried before the court without a jury. Findings of fact and conclusions of law entitling the defendants to a judgment of dismissal and for their costs were made by the court and filed on February 28, 1914. Formal judgment was entered accordingly on the same day. Thereafter, on March 2, within the time allowed by statute, counsel for the plaintiff moved for a new trial upon all of the statutory grounds, save those relating to excessive or inadequate assessment of damages, which, of course, were not applicable to such a decision. This motion was, after argument thereon by counsel for the respective parties, granted by the court, and an order entered accordingly granting the plaintiff a new trial. The defendants have appealed from this order.

Our statute contemplates the granting of a new trial "after a trial and decision by a jury, court, or referees," and that "the former verdict or *other decision* may be vacated and a new trial granted" for certain enumerated statutory causes. The italics are ours. Rem. & Bal. Code, §§ 398, 399 (P. C. 81 §§ 727, 729). The granting of a motion for a new trial, except when involving questions of law only which necessarily are determinative of the rights of the parties, is within the discretion of the trial court. In view of the provisions of our new trial statute above noticed, we are unable to see that the exercise of this discretion by a trial court is any more subject to our control when the decision in a case is rendered by the court than when it is rendered by a jury.

The record brought here in this case does not affirmatively show such an abuse of discretion by the trial court as warrants our interference with the order granting a new trial. The order granting a new trial does not recite the grounds upon which it is rested by the trial court, and we cannot say, from the record before us, that respondent should be denied a new trial under any possible view of the case.

Some contention is made by counsel for appellants that the motion for new trial granted by the court was a second motion for new trial, and that a former one made by respondent had been by the court denied. Counsel, upon this assumption of fact, invokes the rule that the disposition of one motion for new trial exhausts the court's power to interfere, by motion for new trial, with the decision of the jury or the court, as the case may be; citing *Burnham v. Spokane Mercantile Co.*, 18 Wash. 207, 51 Pac. 363, and *Coyle v. Seattle Elec. Co.*, 31 Wash. 181, 71 Pac. 733. There appears in the clerk's minutes of February 28, the day of making the findings and rendering the judgment, the following:

"Motion for new trial is denied. Exception allowed. Findings of fact and conclusions of law are signed. Judgment is signed."

There is nothing else in the record indicating that any such motion had been made.

We are satisfied from the record that, at the time of the court's rulings, as evidenced by the above quoted journal entry, there had not been any motion for new trial made in behalf of respondent. Indeed, it was not until the making of the court's decision in the form of findings and conclusions that the time for making a motion for new trial had arrived. The trial court could not thus deprive respondent of his right to the benefit of a motion for new trial made within the statutory time following the making of the findings and conclusions; hence the court's ruling, purporting to deny a motion for new trial before any such motion was made, was of no

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effect as against respondent. This, manifestly, was recognized by the court upon the hearing of the motion for new trial made after the decision.

The order granting respondent a new trial is affirmed.

ALL CONCUR.

[No. 12238. Department Two. June 21, 1915.]

MAY E. WILLIAMS, *Respondent*, v. PARIS A. WILLIAMS,
Appellant.¹

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence will not be disturbed on appeal, where on trial *de novo*, the supreme court is unable to say that the evidence does not preponderate against them.

DIVORCE—DIVISION OF PROPERTY — EVIDENCE — SUFFICIENCY. Upon granting a divorce to a wife on the ground of cruelty and failure to properly provide for her and the children, an award to the wife of property of the value of \$24,800, leaving the husband property of the value of \$71,500, will be upheld, where consideration of the needs and circumstances of the parties appears to warrant the division, and the trial court had the advantage of seeing the parties and hearing them testify.

Appeal from a judgment of the superior court for King county, Humphries, J., entered March 9, 1914, upon findings in favor of the plaintiff, in an action for divorce, tried to the court. Affirmed.

Byers & Byers, for appellant.

Beeler & Sullivan, for respondent.

Crow, J.—This is an action for divorce, commenced by May E. Williams against Paris A. Williams. From a decree in plaintiff's favor, the defendant has appealed.

On August 30, 1910, appellant, then sixty-two years of age, and respondent, then thirty-six years of age, after a brief courtship, were married in Seattle, Washington. Both parties had been previously married and had children. Ap-

¹Reported in 149 Pac. 342.

pellant has large property holdings in this state and in the state of Nebraska. Respondent owned six acres of land near Lake Washington, which were disposed of as hereinafter stated. Subsequent to the marriage, appellant built a residence on certain lots in the city of Seattle, which he conveyed to respondent and which they occupied as a home. Respondent commenced this action on July 26, 1913. After hearing the evidence, the trial judge, in substance, found, that appellant had been guilty of cruel and inhuman treatment towards respondent; that he had been guilty of personal indignities rendering her life burdensome; that he was stingy, miserly, penurious and quarrelsome; that, during their entire married life, he had provided respondent with but one blue serge suit and one dress; that, on one occasion, when she asked for money to purchase needed underwear for herself and her adopted daughter, he grudgingly offered her one dollar and a car ticket for that purpose, and that appellant was wholly wanting in human sympathy and failed to show any love or affection toward respondent. Other instances of conduct on appellant's part tending to support the allegations of the complaint were stated in the findings.

The trial judge further found that, prior to their marriage, respondent owned some household goods and furniture which were used by the parties throughout their married life; that she also owned the six-acre tract of land above mentioned, located about three-fourths of a mile from Woodinville, which was sold at the value of \$1,200 in exchange for and part payment on an automobile which the parties purchased for \$2,400; that appellant owned 860 acres of tillable land in four separate tracts in the state of Nebraska, of the total value of \$70,000, subject to mortgages amounting to \$13,500; that he owned certain unincumbered city property in Nebraska of the value of \$2,500, and that he owned the following real estate in the state of Washington:

A. Lots 5 and 6, in block L, of William M. Bell's Fifth addition to the city of Seattle, situate at the southeast corner

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of Fourth avenue and Battery street, designated in the record as the Battery street property, of the approximate value of \$30,000, subject to a mortgage of \$5,000 and special assessments for about \$11,681, the net value of the property over and above incumbrances being \$13,319.

B. The east 65 feet of the south 10 feet of lot 6, and the east 65 feet of lot 7 in block 46, Terry's First addition to the city of Seattle, designated in the record as the James street property, located at the northeast corner of Seventh avenue and James street, of the approximate value of \$20,000, subject to a mortgage of \$7,500, the net value over and above the incumbrance being \$12,500.

C. Lots 1 to 22, inclusive, of block 6 of Burns' addition to the city of Seattle, designated in the record as the Green Lake property. Lots 1 to 18 are vacant and unimproved. Lots 19 to 22, inclusive, are the property on which the home is located where appellant and respondent resided at the time of the commencement of this action. The aggregate value of the lots 1 to 22, together with the house and household goods and effects, approximates \$16,000, subject to a mortgage of \$6,000, the total value over and above the incumbrances being \$10,000. This is the property upon which the residence was built by appellant, and which was conveyed by him to respondent.

D. One hundred and sixty acres of land in sections 25 and 30, in township 22, north of range 1, in Pierce county, Washington, designated as the Pierce county property. This property is of the value of \$1,800, subject to taxes and assessments amounting to \$300, leaving a net value of \$1,500.

The trial judge further found that \$2,000 is a proper and legal allowance to be made to respondent for attorney's fees, in addition to \$250 allowed at the commencement of the action; that, in the event of an appeal, \$250 is a proper and legal amount to be allowed respondent as suit money therefor, and that \$10 per week is a proper and legal amount to be allowed her pending such appeal.

Upon these findings, the trial judge entered a decree, granting a divorce to respondent and awarding her, as her separate estate, the household goods, the automobile, the Green Lake property, the Battery street property, and the Pierce county property, an attorney's fee of \$2,000, \$250 suit money in case of an appeal, and \$10 per week pending such appeal. The real estate thus awarded to respondent was found to be of the approximate value of \$24,819 over and above incumbrances. All of the Nebraska property and the James street property, of the value of about \$71,500 over and above incumbrances, were awarded to appellant, it being provided, however, that respondent should have a lien on the James street property for the attorney's fee and the further allowance made in the event of an appeal.

Appellant makes numerous assignments of error, some predicated on the rejection and admission of evidence. We have only considered evidence which we regard as competent and admissible, and find that no evidence was excluded to appellant's prejudice. After a careful examination of all the evidence, which is conflicting, we are unable to conclude, upon a trial *de novo*, that it does not preponderate in favor of the findings made by the trial judge, which we now sustain.

Appellant's principal contention is that the allowances made to respondent are excessive and that the same should be materially reduced. At first blush, it might seem that the allowance is liberal, but when we come to examine the entire record, we fail to see that we could make any material change and find support in the record for so doing. The evidence shows that, prior to their marriage, appellant agreed, not only to make ample provision for respondent, but also to educate her son and her adopted daughter, both of whom were minors; that he entirely failed to do so, with the exception that he gave the daughter a few months' schooling; that the son was compelled to earn his living, paying board to appellant, and that he also provided clothing and other assistance for his mother. Respondent at all times seems to have con-

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ducted herself as a dutiful and faithful wife. She faithfully attended to her household and domestic duties, and no serious complaint is made of her conduct in any regard. She has a young son and adopted daughter. Appellant's children are all grown and of mature years. He still has property of great value, capable of producing a good income. The property awarded to respondent is burdened with heavy incumbrances. After she cares for them her income will be materially limited. Only by prudent management and the exercise of economy will she be able to discharge the liens and protect her equities. An award of money to respondent in lieu of the real estate might do appellant a serious injustice, compelling him to sacrifice considerable property to make payment. In view of the fact that the trial judge saw the parties, heard them testify, knew their respective needs and resources, and made such a division as to him seemed just and proper, we have concluded, after a careful examination of the evidence upon a trial *de novo*, that we will not disturb the award which he has made.

The judgment is affirmed.

MORRIS, C. J., ELLIS, MAIN, and FULLERTON, JJ., concur.

[No. 12316. Department Two. June 21, 1915.]

NATIONAL SURETY COMPANY, *Respondent*, v. FRY COMPANY
et al., *Appellants*.¹

PLEADING—ANSWER—AFFIRMATIVE DEFENSE. It is not error to sustain a demurrer to an affirmative defense when all the issues presented by the affirmative answer were sufficiently presented by the denials in the answer proper.

ABATEMENT—WRONGFUL ATTACHMENT—DEFENSES. It is no defense to a wrongful attachment that the property had already been levied upon and was held upon a prior attachment for a claim greater than the value of the property; since the prior attachment might either be released or unsustained.

INDEMNITY—JUDGMENT AGAINST INDEMNITEE—CONCLUSIVENESS—SHERIFFS—INDEMNITY BOND. Where a sheriff is sued for wrongful attachment, and gives the indemnitors notice and full opportunity to defend, in the absence of fraud or mistake, judgment against the sheriff is conclusive as between him and the indemnitors on the question of the sheriff's liability and the facts necessary to sustain it; but where two writs were in the hands of the sheriff, judgment against the sheriff would not be conclusive that the writs had been levied, since levy of both writs was not essential to the judgment.

SHERIFFS—INDEMNITY BOND—ACTIONS—EVIDENCE OF LEVY—SUFFICIENCY. In an action upon an indemnity bond, given to protect the sheriff upon the levy of a writ of attachment, the evidence sufficiently shows that the sheriff made the levy of the writ upon property already levied upon and in possession under a prior writ, where the uncontradicted testimony of the deputy sheriff was to the effect that plaintiff's attorney, upon demand on the sheriff for the return of the goods, directed the sheriff to hold the goods under plaintiff's writ in case the prior writ was released; especially where there was no evidence to overcome the presumption that the sheriff did his duty when the writ was delivered to him with demand for its levy, together with the bond of indemnity for his protection.

INDEMNITY—JUDGMENT AGAINST INDEMNITORS—CONCLUSIVENESS—SHERIFFS. A judgment against a sheriff for wrongful attachment, is conclusive against the indemnitors in the attachment bond, where the writ was actually levied on their demand and they had notice of the original action and were tendered the defense, irrespective of whether they accepted the defense made and participated therein.

¹Reported in 149 Pac. 637.

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Appeal from a judgment of the superior court for King county, Dykeman, J., entered May 1, 1914, upon findings in favor of the plaintiff, in an action on an indemnity bond, tried to the court. Affirmed.

Oliver Hulback, for appellants.

John W. Roberts and *George L. Spirk*, for respondent.

ELLIS, J.—This is an action against attaching creditors and the sureties on the attachment bond, brought by the surety on the sheriff's official bond, who had been compelled to pay a judgment against the sheriff for the value of goods destroyed by fire while held under a wrongful attachment. In order to give any proper understanding of the issues, an extended statement is necessary.

On June 1, 1911, the defendant A. C. Fry & Company commenced an action in the superior court for King county against C. Cazon and wife, and delivered to the sheriff a writ of attachment, together with an indemnity bond upon which the defendants English and Lavansky were sureties. On the same day, Lewis C. Troughton brought an action in the justice court against the same defendants, and delivered to the sheriff a writ of attachment, together with an indemnity bond. The sheriff took possession of certain chattels and stored them in a warehouse. There was no direct evidence to show under which writ the chattels were attached or whether a levy was made under both writs; but the deputy sheriff, who had the attachments in charge, testified that, in June, 1911, the attorney for defendant Fry & Company instructed him to hold the goods under the Fry & Company attachment in case of the release of the Troughton attachment. On June 12, 1911, Chrysanthé Cazon, wife of C. Cazon, made demand on the sheriff for the return of part of the chattels attached, claiming them as her separate property. Notice of this demand was given to the defendant Fry & Company. It is not claimed that that company then dis-

claimed the attachment or authorized a redelivery of the goods. The sheriff did not comply with this demand. On June 21, 1911, Mrs. Cazone assigned her claim to C. D. Kostglos. On June 26, 1911, the actions of Fry & Company and of Troughton were settled and dismissed and Kostglos received an order from the sheriff on the warehouse for the goods, but they had already been destroyed by fire. In September, 1911, Kostglos brought an action against the sheriff for the value of the goods. Fry & Company and the other defendants here were notified and requested to defend the sheriff in the Kostglos suit. This notice was in writing and its service and sufficiency are not questioned. Troughton defended by an attorney. The evidence as to whether or not A. C. Fry & Company and English and Lavansky participated in the defense is in conflict. Plaintiff's attorney, who represented the sheriff in the original action, testified to the effect that defendants' attorney, in response to the notice, called, talked over the whole matter with him, and told plaintiff's attorney to go ahead with the case, adding, "You know more about it than I do, and anything you do will be all right with me." He also testified to the effect that the sheriff's answer was afterwards submitted to and approved by defendants' attorney. Judgment went against the sheriff for \$50 and costs in favor of Kostglos, who assigned his judgment to F. M. Wilson. Wilson brought suit against the National Surety Company, as surety on the sheriff's official bond, to recover the amount of the judgment. The sheriff was later made a party defendant to that action and the defendants here were notified and requested to defend, but did not do so. Judgment was entered against the sheriff and the National Surety Company.

The Surety Company paid the judgment, took an assignment of the sheriff's rights against the attaching creditors and their bondsmen, and brought this action. In its complaint, it alleged the delivery of the two writs of attachment; that the sheriff levied the respective writs at the

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request of the defendants Fry & Company and Troughton and as directed by their attorney; that the defendants were notified and requested to defend both of the prior actions and actually participated in the defense of the original action against the sheriff, and alleged generally the facts above stated. Troughton made no appearance and a default was entered against him. Fry & Company, English and Lavansky answered, denying that the sheriff made any levy under the Fry & Company writ, denying that they directed the defense of the action against the sheriff or in any manner participated in the defense, denying any liability in the premises; and, for an affirmative defense, alleged that the property was attached under the Troughton writ, and that the Troughton claim exceeded the value of the property, and hence there was no property that could be subject to the Fry & Company writ. A demurrer to this affirmative matter was sustained.

At the close of the plaintiff's evidence, the defendants moved for a nonsuit on the ground that there was no evidence that Fry & Company had directed the levy of the attachment or that any levy had been made under its writ. The court denied the motion. A colloquy between the court and counsel indicated that the denial was mainly upon the ground that the defendants had been notified and requested to defend the original actions and hence were bound by the judgments therein. The court, however, indicated that his ruling was also partly upon the oral evidence which had been introduced.

As to the scope of the defense which would be permitted, the court advised counsel for the defendants that he might offer any evidence he desired in order to preserve the record. The only evidence introduced or offered by the defendants was the testimony of their attorney denying that he had in any manner defended, or assisted in, or authorized the defense in the original action. The court found for the plain-

tiff and entered judgment in its favor. The defendants Fry & Company, English and Lavansky appeal.

It is first contended that the court erred in sustaining the demurrer to the defendants' so-called affirmative defenses. We find no error in this. Whatever the grounds upon which the demurrer was sustained, we are clear that it might have been properly sustained upon the ground that every issue presented by the affirmative matter was sufficiently presented by the denials contained in the answer proper. The fact, if it be a fact, that the Troughton claim was more than the value of the property, was immaterial. Troughton might have released his attachment or might have been unable to sustain his claim, in either of which events the Fry & Company attachment, assuming that it was subsequent to the Troughton attachment, would still have held the property. Rem. & Bal. Code, § 657 (P. C. 81 § 433); *Meyer v. Purcell*, 114 Ill. App. 472.

The appellants' main contention is that the findings of the trial court to the effect that the Fry & Company writ was actually levied and the property held thereunder, and that the appellants accepted the defense in the original action through their attorney, are not supported by the evidence.

It is conceded, of course, that respondent here is subrogated to whatever rights the sheriff would have against the appellants. The respondent claims that the appellants, having been given notice of the action against the sheriff and accorded an opportunity to appear to defend, are bound absolutely by the judgment against the sheriff, and can offer no defense in an action by the sheriff against them on the indemnity bond. It is therefore argued that the finding in the original suit against the sheriff that the Fry & Company writ was actually levied and the goods held thereunder as well as under the Troughton writ, was conclusive evidence of that fact in this action. The respondent's statement of the rule is too broad, and the argument based thereon seems

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to us unsound. The correct rule is that, when a sheriff is sued touching a matter upon which he has taken a bond of indemnity, and gives the indemnitors notice, offering ample opportunity to appear and defend or aid in the defense, the judgment against the sheriff, in the absence of fraud, collusion, or mistake, is conclusive as between him and the indemnitors on the question of the sheriff's liability and the facts necessary to establish it. The cases cited by the appellants, so far as pertinent at all, go no further when confined to their facts. *Miller v. Rhoades*, 20 Ohio St. 494; *Davis v. Smith*, 79 Me. 351, 10 Atl. 55; *Meyer v. Purcell*, *supra*; *Train v. Gold*, 5 Pick. 380.

The case of *Van de Vanter v. Davis*, 23 Wash. 693, 63 Pac. 555, does not touch the question here involved. The foregoing is also the general rule as to the extent of the conclusive effect of judgments as against persons not parties thereto, but liable over either by express contract or by operation of law. *City of Bloomington v. Roush*, 13 Ill. App. 339; *Littleton v. Richardson*, 34 N. H. 179, 66 Am. Dec. 759; *Veazie v. Penobscot R. Co.*, 49 Me. 119; *Town of Waterbury v. Waterbury Traction Co.*, 74 Conn. 152, 50 Atl. 3. See, also, *Spokane v. Costello*, 33 Wash. 98, 74 Pac. 58. There are decisions which hold that, even in the absence of notice and opportunity to defend, the judgment is *prima facie* evidence against the indemnitors, but these also hold it is only *prima facie* evidence as to the fact and amount of the officer's liability. *Charles v. Hoskins*, 14 Iowa 471, 83 Am. Dec. 378, and note. There are other decisions holding that the judgment, even without notice, is conclusive as against the indemnitors, but only as to those things going to establish the existence and extent of the indemnitors' liability. *Conner v. Reeves*, 103 N. Y. 527, 9 N. E. 439; *Pasewalk v. Bollman*, 29 Neb. 519, 45 N. W. 780, 26 Am. St. 399. These decisions usually rest upon the peculiar wording of the bond or contract of indemnity. *Costello v. Bridges*, 81 Wash. 192, 142 Pac. 687, L. R. A. 1915 A.

853. Whatever the effect of notice or lack of notice, we have been cited to no decision, and have found none, in which it has been held that the judgment against the indemnitee, whether an officer or not, is conclusive against the indemnitor except as to those things essential to establish a liability on the part of the indemnitee and as to the amount of that liability. We know of no case holding that the judgment is conclusive of collateral issues material only as between the indemnitee and the indemnitor, but not essential to a recovery by the injured party in an action against the indemnitee.

In the present case, it may be soundly asserted that, since the original action was against the sheriff in his official capacity for wrongful attachment, it was necessary to a recovery in that action to prove that he held the goods under an attachment. Had the Fry & Company writ been the only writ delivered to the sheriff for levy on these goods, then it might be successfully asserted that the finding in the original action of the levy of that attachment would be conclusive of the question against the appellants in this action. But it is admitted that the two writs were delivered to the sheriff for levy upon these goods. Proof in the original action that either one of these was levied and the goods held thereunder would have been sufficient to warrant judgment against the sheriff in that action. It cannot be postulated, therefore, that a finding of the levy of both of the writs was an essential to the judgment in that action. Since the original action might have been sustained without proof of any levy or holding by the sheriff under the Fry & Company writ, the judgment in that action was not presumptive evidence of that fact, which must be established in this action. *Boyn-ton v. Morrill*, 111 Mass. 4.

We have discussed this matter thus fully because the extensive briefs are almost wholly devoted to it, and the court seems to have been impressed with the view that the judgment was conclusive of the fact that the goods were being

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held under the Fry & Company writ. Though this view was erroneous, it does not follow that the finding complained of was not supported by competent evidence. As pointed out in our statement of the case, the deputy sheriff, who had both attachments in charge, testified that, at about the time when Mrs. Cazone made demand upon the sheriff for the goods, the attorney for the appellants and acting in their behalf directed that, if the Troughton attachment were released, the goods should be still held under the Fry & Company writ. The attorney, the one person who could have contradicted this testimony, if it was false, subsequently took the witness stand, but did not contradict it. It will not do to say that he was precluded from so doing by the court's ruling on the demurrer to the affirmative defenses and on the motion for a nonsuit, since the court expressly advised counsel that he might offer any evidence which he deemed pertinent. Had counsel for the appellants offered his own testimony in contradiction of that of the deputy sheriff above noticed, it is fair to assume that it would have been received, since the court did admit his testimony in contradiction of that of the attorney for the respondents touching the question of the appellants' participation in the defense of the original action.

There is another consideration which also tends to support the court's finding that the Fry & Company writ was actually levied. Its writ was delivered to the sheriff for the purpose of levy, together with the bond of indemnity, for his protection in making the levy. It thereupon became the sheriff's duty to make the levy and, in the absence of proof to the contrary, there is a presumption that the officer performed his duty. We think, therefore, that, aside from any presumption raised by the findings and judgment in the original suit, there was evidence sufficient to sustain the finding of the court that the Fry & Company writ was actually levied, and that the goods were being held thereunder at the time of their destruction.

Whether the appellants, through their attorney, accepted the defense of the original action by adopting the sheriff's defense through the sheriff's attorney, as testified to by that attorney, which was apparently the basis of the court's finding that the appellants accepted and participated in the defense in the original action, is a question upon which the evidence was, as we have seen, in sharp conflict. It certainly cannot be said that the finding was supported by no competent evidence. Nor can we say that the evidence preponderates against the finding. In such cases, it is the established rule that we will not disturb the court's findings. *Johns v. Arizona Fire Ins. Co.*, 76 Wash. 349, 136 Pac. 120, 49 L. R. A. (N. S.) 101. This last finding, however, was not essential to sustain the judgment. The finding of the court upon what we have held sufficient evidence, that the Fry & Company writ was actually levied and that the goods were being held thereunder, and the admission that the appellants had notice of the original action against the sheriff and were tendered the defense of that action, were sufficient to make the judgment conclusive upon the appellants as to the fact and amount of the sheriff's liability.

The judgment is affirmed.

MORRIS, C. J., MAIN, FULLERTON, and CROW, JJ., concur.

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Opinion Per MOUNT, J.

[No. 12459. Department One. June 21, 1915.]

L. S. KENWORTHY, *Respondent*, v. FRANK RICHMOND *et al.*,
Appellants.¹

HUSBAND AND WIFE—ALIENATION OF AFFECTIONS—COMPLAINT—CHARGE OF ADULTERY. In an action for alienation of affections of plaintiff's wife, the complaint does not charge an act of adultery, where it merely alleges a conspiracy to bring the wife to W. for immoral purposes, and that she occupied a room in a hotel with one of the defendants for about an hour on a certain night.

SAME—ALIENATION OF AFFECTIONS—INSTRUCTIONS—CHARGE OF ADULTERY. In and action for the alienation of the affections of plaintiff's wife, it is error to give an instruction upon the subject of the commission of adultery when there was no evidence thereof other than proof of opportunity in that the wife had occupied a room with such defendant for about an hour one night, and then retired therefrom; since the rule requires proof of an adulterous disposition on the part of both, as well as proof of opportunity.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered March 13, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action for alienation of affections. Reversed.

Sharpstein & Sharpstein and *Pedigo & Smith*, for appellants.

Leon B. Kenworthy and *Rader & Barker*, for respondent.

MOUNT, J.—This action was brought to recover damages for the alleged alienation of the affections of the plaintiff's wife. The case was tried to the court and a jury. A verdict was returned in favor of the plaintiff, and a judgment was subsequently entered thereon. The defendants have appealed.

The complaint alleged, that L. S. Kenworthy and Goldie Kenworthy were at all times therein mentioned husband and wife; that they had been living in Portland, Oregon, and

¹Reported in 149 Pac. 348.

were living happily and peaceably together, and had been for many years, having had born to them three children, two of whom are now living; that the defendants, Frank Richmond and Elizabeth Garrett, connived and conspired together to disrupt and break up the home of the plaintiff and wife, and that Elizabeth Garrett came to Portland and stopped at their home, and at once began to make trouble between the plaintiff and wife, so much so that the plaintiff was compelled to leave his home; that then and thereafter the said Elizabeth Garrett prevailed upon Goldie Kenworthy to come to Walla Walla, Washington, and then and there the said Frank Richmond and Elizabeth Garrett further conspired and connived with the wife of the plaintiff and induced her to send letters to the sheriff of Multnomah county, Oregon, falsely and derogatorily to the plaintiff asking protection from him; that the defendants conspired and connived together to bring the said Goldie Kenworthy to Walla Walla for immoral purposes; and on the night of January 6, 1914, within the city of Walla Walla, Washington, the said Goldie Kenworthy stayed with the said Frank Richmond in the Palace Hotel, from 9:55 p. m. until 11:30 p. m., in room 19; that, prior to the time Elizabeth Garrett visited the home of the plaintiff in Portland, the plaintiff and wife were getting on happily together, but on account of the acts, persuasions, falsifications, and maledictions of the said defendants toward the plaintiff, he has been caused the keenest mental pain and anguish and financial embarrassment, and trouble with the state authorities of Oregon, and the affections of his wife have been alienated, to his damage in the sum of \$10,000. Wherefore, the plaintiff prays judgment, etc.

The defendants appeared separately and denied generally the allegations of the complaint. At the close of all the evidence, the defendants requested the court to instruct the jury to the effect that the complaint did not charge any immoral act or conduct on the part of Mrs. Kenworthy and

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the defendant Richmond, and that the evidence was not sufficient for the jury to find that Mrs. Kenworthy and the defendant Richmond had committed adultery at any time or place; that the jury should not consider the complaint or the evidence upon that subject in arriving at their verdict. The court refused to so instruct the jury, but gave the following instruction:

"While the complaint in this action does not directly charge the defendant Richmond with having committed adultery with the wife of the plaintiff, yet if you find by a preponderance of the evidence that the defendant Richmond and the wife of the plaintiff occupied a room in the Palace Hotel together, you may consider that fact in determining whether the defendant Richmond is liable in this case, and before you could find that Richmond committed adultery with plaintiff's wife, the plaintiff must first prove an adulterous disposition on the part of Richmond toward Mrs. Kenworthy; second, an adulterous disposition on her part toward the defendant; and third, the opportunity for the gratification of this adulterous disposition. Mere opportunity is not sufficient, neither is the adulterous disposition without the opportunity sufficient; neither would it be sufficient to prove an adulterous disposition on the part of the defendant, coupled with the opportunity, unless there is also proven an adulterous disposition on the part of the plaintiff's wife. In arriving at all these things you may consider such facts as are in evidence before you concerning the conduct of the defendant Richmond and plaintiff's wife, and draw such reasonable deductions from the facts in evidence as you believed can reasonably be drawn from them."

It is argued by the appellants that this instruction is erroneous for the reason that it tells the jury that the complaint charges the defendant Richmond with having committed adultery with the wife of the plaintiff, and authorizes the jury to find from the evidence that Richmond and the plaintiff's wife did in fact commit adultery. It is plain, we think, that the complaint does not charge that the defendant Richmond committed adultery with the plaintiff's wife, and

but for the first part of the allegation, to the effect that the defendants conspired together to bring Goldie Kenworthy to Walla Walla for immoral purposes, there would not even be an inference of adultery. If the plaintiff intended to charge that the defendant Richmond committed adultery with the wife of the plaintiff, the allegation should have stated that fact positively. We apprehend the rule in cases for alienation of affections is not different from the rule in actions for divorce. In such cases, Mr. Bishop, in *Marriage, Divorce & Separation*, vol. 2, § 1325, says:

“The act of adultery must be duly shown. The allegation should state positively, not from information and belief, or otherwise in uncertain terms, that, at a time and place specified, the defendant committed the carnal act with a person named; unless something of this particularity is unknown, when the want of knowledge may be averred as a substitute therefor.”

Clearly the allegation in this case does not meet that rule. If the plaintiff intended to charge the defendant Frank Richmond with having committed adultery with Mrs. Kenworthy, he should have done so in plain, unambiguous language, without resorting to inference therefor. We are satisfied that the complaint does not charge adultery.

The proof was not as strong as the allegations of the complaint. The plaintiff testified that, on the night in question, at about the hour named in the complaint, he saw his wife go to a room which had been assigned to the defendant Frank Richmond, and that she remained there from an hour to an hour and a half. Another witness for the plaintiff testified in substance to the same effect. It was not shown that Mrs. Kenworthy was of an adulterous disposition. It was not shown that no one else was in the room at that time. The mere fact was stated that she went to the room and remained there from an hour to an hour and a half, and then retired therefrom. It is plain, we think, that this is not sufficient proof of adultery.

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In *Pollock v. Pollock*, 71 N. Y. 137, in a divorce case, upon the question of adultery, the court said at page 146:

"I think that proof of the parties charged, being alone together in a set of rooms at times, and passing many days in succession together there, and some evenings, is not of itself sufficient to sustain the allegation. There should be some accompanying circumstances, fitted to fairly induce a belief that it was not for a proper purpose. The being thus together, to be sure, gives opportunity. There must be more than that; some circumstances to show a disposition to avail themselves of the opportunity, and to ground an inference that they have actually done so. (*Harris v. Harris*, 2 Haggard 376). The court must be satisfied that a criminal attachment subsisted between the parties, and that the parties intended to indulge in the intercourse for which they had opportunity."

In *Müller v. Müller*, 20 N. J. Eq. 216, the court said:

"A divorce can never be granted upon a general charge of adultery with divers persons whose names are unknown, within a specified period of time. Such charge is bad pleading, and no bill or petition should contain it. A bill for divorce should not be filed upon general suspicion, nor until the discovery of some specific act, or of the facts from which such act must be inferred, and these should be sufficiently stated to identify the act upon which the suit is founded."

See, also, *Freeman v. Freeman*, 31 Wis. 235. In this last named case the court said:

"'Every act of adultery,' says Mr. Bishop (§ 619), 'implies three things: First, the opportunity; second, the disposition in the mind of the adulterer; thirdly, the same in the mind of the *particeps criminis*. And the proposition is substantially true, that, whenever these three are found to concur, the criminal (f)act is committed.'"

While the latter part of the instruction given no doubt correctly states the rule of law upon the question, the allegations of the complaint and of the evidence before the court, according to that rule, were insufficient to justify the submission of that question to the jury. There was no evidence

upon which the jury could find that the criminal act of adultery had been committed. The first part of the instruction stated to the jury that "While the complaint in this action does not directly charge the defendant Richmond with having committed adultery with the wife of the plaintiff, yet if you find by a preponderance of the evidence that the defendant Richmond and the wife of the plaintiff occupied a room in the Palace Hotel together, you may consider that fact in determining whether the defendant Richmond is liable in this case," The jury no doubt understood from that statement that the complaint did state that Richmond and the plaintiff's wife had committed the crime of adultery, and that if they so found, then it followed that Richmond was liable. We think this is clearly erroneous, first, because the complaint does not charge adultery, and second, because the evidence was entirely insufficient to be submitted to the jury upon that question. The court should, therefore, have instructed the jury as requested by the defendants upon the question of adultery, and should not have given the instruction which was given. We have no doubt that this instruction was prejudicial, and that the jury based the verdict largely, if not wholly, upon it.

The judgment is therefore reversed, and the cause remanded.

MORRIS, C. J., and PARKER, J., concur.

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Opinion Per ELLIS, J.

[No. 12603. Department Two. June 21, 1915.]

W. H. JEFFRIES *et al.*, *Appellants*, v. J. W. SPENCER *et al.*,
Respondents.¹

LANDLORD AND TENANT—UNLAWFUL DETAINER—CONDITIONS PRECEDENT—PROVISION IN LEASE—NOTICE. Demand and notice to quit is a condition precedent to an action against a tenant for unlawful detainer, under Rem. & Bal. Code, § 812, requiring notice and giving three days' grace thereafter, and the same is not excused by a clause in the lease providing for its termination at the lessor's option on default in payment of the rent for thirty days after due; nor by the fact that waste is charged.

EJECTMENT—LEASED PREMISES—EXPIRATION OF TERM. An action of unlawful detainer of leased premises cannot be upheld as an action of ejectment where the term had not expired.

EJECTMENT—PROCESS—JURISDICTION. The special summons authorized in unlawful detainer is insufficient to confer jurisdiction in ejectment.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered July 10, 1914, upon sustaining a demurrer to the complaint, dismissing an action for unlawful detainer. Affirmed.

O. M. Nelson, for appellants.

E. S. Avey, for respondents.

ELLIS, J.—Action for unlawful detainer of leased premises. On March 7, 1913, the plaintiffs, by written lease, demised to defendants certain farm lands in Chehalis county for one year, with the option in the lessees to renew the lease, on specified terms, for one or more years up to five. The stipulated rental for the first year was \$300, to be paid by clearing and plowing a certain twelve acres, or in the alternative in cash, one-half on September 1, 1913, and one-half on January 1, 1914. The lease provided that, in case of default in the payment of any portion of the rent when due and for

¹Reported in 149 Pac. 651.

thirty days thereafter, the lessors might reenter and at their option terminate the lease.

In January, 1914, the plaintiffs brought this action to recover possession of the premises. In their complaint they set out generally some of the terms of the lease; alleged that none of the land had been cleared nor any of the rent paid; that, about December 1, 1913, they notified the defendants to vacate the premises and now elect to terminate the lease; that the defendants have committed waste of the premises to the plaintiff's damage in the sum of \$1,000; that they were the owners in fee simple of the premises; that the defendant J. W. Spencer assaulted the plaintiff W. H. Jeffries, thereby damaging plaintiff in the sum of \$1,000. The prayer was for a writ of restitution, a cancellation of the lease, and for judgment in the sum of \$2,600. The summons was the special statutory summons prescribed in such cases. Rem. & Bal. Code, § 818 (P. C. 81 § 1409).

Pursuant to this complaint and upon the filing of a bond by plaintiffs, conditioned as in an action for unlawful detainer (Rem. & Bal. Code, § 819 [P. C. 81 § 1411]), a writ of restitution was issued and plaintiffs were placed in possession of the premises. A general demurrer to the complaint was overruled.

The defendants by answer, so far as here material, admitted their entry under the lease; denied any failure to perform the agreed labor; denied that any notice was given them to vacate the premises prior to the commencement of this action; denied the commission of any waste; admitted striking plaintiff, but sought to justify the assault; averred their willingness to perform all the covenants of the lease, but alleged that they were prevented from doing so by the conduct of the plaintiffs. The reply traversed the affirmative matter in the answer.

When the case was called for trial, the defendants objected to the introduction of any evidence on the ground that the complaint failed to state a cause of action, in that

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it contained no allegation of the giving of any written notice to pay rent or vacate as prescribed by statute. The plaintiffs admitted that no such notice was given. Thereupon the court sustained the objection, dismissed the cause with prejudice, and awarded defendants their costs. The plaintiffs appeal.

It is contended: first, that, because of the provision in the lease for its termination at the lessors' option on default in payment of any rent for thirty days after due, the statutory notice to quit or pay rent was unnecessary; second, that this is an action in ejectment in which the statutory notice is not a condition precedent.

First. It is claimed that, to require the alternative notice where the lease itself provides for a forfeiture of the term for nonpayment of rent at the lessors' option, would be an interference with the right of contract. This position is untenable. It misses the only legitimate purpose of the provision in question. It construes as penal a provision which from the nature of the contract could only be intended as remedial. The clear purpose of such a provision, however worded, is to insure the payment of rent. The statute, recognizing this remedial purpose, imports into every lease the three days of grace after notice, and permits a forfeiture of the term only in case of a failure to comply with such notice. Rem. & Bal. Code, § 812 (P. C. 81 § 1397). If the rent be paid within the three days, every legitimate purpose of the contract has been met. To construe the provision otherwise would be to pervert the true purpose of the contract and to enforce a penalty and encourage a forfeiture, both of which, even in the absence of a contravening statute, are contrary to the settled policy of the law.

It is no answer to say that the payment of rent would permit a continuance of waste by the tenant, thus abrogating the right of reentry for waste. The fifth subdivision of the above cited section of the statute permits the maintenance of the action on a mere three days' notice to quit, without

the alternative of paying rent. The clear purpose being to require, as a condition precedent to the institution of the action for unlawful detainer, the three days' notice to quit or pay the rent, where reentry is sought for nonpayment of rent, and the simple three days' notice to quit, where the offense of the lessee is waste or an illegal use of the premises. In either case, the sole purpose of the provision in the lease for a termination of the term is fully met. The appellants overlook the plain fact that the summary action for unlawful detainer is only accorded after three days' notice either to quit or pay the rent, or quit absolutely, according to the nature of the default. It is no hardship to require the giving of the statutory notice as a condition precedent to invoking the benefit of the statutory remedy. In the case before us, the plaintiffs seek to terminate the lease both for the failure to pay rent and because of the commission of waste. To maintain the action, either form of notice would have been sufficient, but it is admitted that neither was given. The notice being a statutory prerequisite to the invocation of the statutory remedy, the action was properly dismissed.

The case of *Shannon v. Grindstaff*, 11 Wash. 536, 40 Pac. 123, which the appellants cite as a case parallel to that before us, is wholly inapplicable to the facts here presented. In that case the tenant had sublet the premises without the consent of the landlord, contrary to the provisions of the lease. The landlord never recognized the sublessee as his tenant, but terminated the lease by an amicable agreement with the original tenant. The sublessee and the landlord never occupied the relation of landlord and tenant. There was no valid lease to terminate as between them, hence no notice was necessary, and ejectment, rather than the action of unlawful detainer, was the proper remedy.

The appellants also cite the recent case of *Keene v. Zindorf*, 81 Wash. 152, 142 Pac. 484, as intimating that the lessee may waive the statutory notice by the acceptance of a lease containing such a waiver. It is true that the lease in-

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volved in that case contained such a waiver, but the court did not pass upon its validity. The court, however, did hold that, even in such a case, the forfeiture of rights under the lease could not be claimed without notice of forfeiture. In any event, the lease here in question contained no such waiver.

Second. We find it unnecessary to determine whether ejectment would lie to recover possession of leased premises where the lease had terminated either by expiration of the term or by the legal exercise of an option to terminate accorded by the lease itself. In the first place, neither of these conditions existed in the present case. The term of the lease had not expired and the lease had not been terminated as required by statute, which, as we have seen, is an implied condition of every lease, certainly in the absence of waiver of notice. In the second place, this is not an action in ejectment, but an action in unlawful detainer. This is shown, not only by the character of the relief sought, but also by the form of the summons. The special summons here employed would be wholly insufficient to confer jurisdiction of the parties in an action in ejectment.

The judgment is affirmed.

MORRIS, C. J., FULLERTON, MAIN, and CROW, JJ., concur.

[No. 12671. Department One. June 21, 1915.]

M. A. JAKLEWICZ, *Respondent*, v. ARTHUR LENHART,
Appellant.¹

PLEADING—COUNTERCLAIM—SUFFICIENCY. In an action to recover on contract for obtaining persons to log plaintiff's land, a counterclaim for damages by reason of the negligence of the loggers, states no defense or claim against the defendant.

APPEAL—DECISIONS APPEALABLE—AMOUNT IN CONTROVERSY—FICTITIOUS COUNTERCLAIM. The supreme court has no jurisdiction of an appeal from a judgment on a demand for less than \$200, where the appellant's so-called counterclaim was purely fictitious so far as legal liability was concerned and no proof was offered in support of it.

Appeal from a judgment of the superior court for Chelalis county, Irwin, J., entered October 22, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Appeal dismissed.

Arthur Lenhart, for appellant.

F. W. Loomis, for respondent.

HOLCOMB, J.—Respondent brought action against appellant to recover the sum of \$100, alleging an oral agreement that he was to procure, or introduce to appellant, persons who would take the job of logging appellant's land, and that if the persons so introduced to appellant took the job and worked at it for thirty days, appellant would pay respondent \$100; that, in accordance therewith, he introduced to appellant persons who logged the timber for more than thirty days, and that respondent performed his part of the agreement. Appellant answered, denying respondent's allegations, and alleging that the agreement was that respondent should procure persons who would take the contract to do the logging for \$4 per thousand for fir and spruce, and \$4.50 per thousand for hemlock and cedar, for which appellant would

¹Reported in 149 Pac. 642.

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pay respondent \$100 when the persons so procured had been working at the logging for thirty days; that respondent failed to procure persons who would take the job of logging at \$4 per thousand for fir and spruce, and \$4.50 per thousand for hemlock and cedar; that the persons so procured would not accept the logging job for less than \$4.25 per thousand for fir and spruce and \$4.50 per thousand for hemlock and cedar; that respondent refused to procure other persons who would accept the work at the prices specified by appellant; that appellant awarded the contract for logging to the persons introduced by respondent, at the prices of \$4.25 for fir and spruce, and \$4.50 for hemlock and cedar. These allegations constituted a direct issue between respondent and appellant as to the terms of the contract and performance thereof. There were then further affirmative allegations, by which appellant attempted to set up a counterclaim by way of damages against respondent, in that the persons who did the logging performed the same in a slow and dilatory manner so that the price of logs dropped one dollar per thousand in the market; that they could have placed on the market, before the price dropped, at least four hundred thousand feet of logs, and that, by reason of their failure so to do, appellant was damaged \$400. A demurrer to the affirmative matter in the answer was overruled, on the theory, perhaps, that the affirmative allegations as to the contract with respondent stated a valid defense and were so interwoven with all the affirmative allegations they could not be separated on general demurrer. Respondent then replied by way of general denial to the affirmative matters in the answer which were inconsistent with respondent's allegations, and the cause proceeded to trial before the court and a jury, and a verdict and judgment against appellant for the sum of \$100 and interest resulted.

Respondent moved to dismiss the appeal on the ground that the amount in controversy is less than \$200, and that this court has no jurisdiction. The noted motion was denied

and passed to decision on the final hearing, since, *prima facie*, appellant appealed from an adverse judgment wherein his nominal counterclaim of \$400 was involved. It is thoroughly obvious that appellant's alleged counterclaim stated no semblance of a cause of action or counterclaim against respondent. If it could be said to state any grounds of recovery at all, it could only be against the persons who did appellant's logging, who were not parties to this action.

As to the form of decision herein, it is immaterial whether we in form dismiss the appeal or merely affirm the judgment. The record makes manifest that appellant did not even offer to introduce evidence in support of his attempted counterclaim. Had he done so, of course it should, and probably would, have been rejected. The issue as to the terms of the agreement was properly submitted to the jury under fair and appropriate instructions.

Numerous errors are claimed by appellant in the rulings of the court upon the cross-examination of witnesses by appellant, the admission and exclusion of evidence, in giving and refusing instructions to the jury, and in denying his motion for a new trial. With a feeling of consideration for and deference to appellant, we have carefully and patiently examined the entire record and find no error worthy of consideration. We do not feel inclined to establish a precedent whereon a practice may grow imposing jurisdiction upon this court in appeals when none exists in substance under the law. On the face of his pleading, appellant's alleged counterclaim was purely fictitious so far as any legal liability of respondent was concerned. Nor did appellant attempt to preserve the substance of it by offering proof in support of it at the trial. Our appellate jurisdiction extends, in suits for the recovery of money or personal property, only to cases where the original amount in controversy or the value of the property exceeds the sum of \$200. Const., art. 4, § 4. The amount in controversy is determined by the allegations of the pleading, not by the demand of the suitor. *Ingham v. Harper*

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& Son, 71 Wash. 286, 128 Pac. 675, Ann. Cas. 1914 C. 528. There was no amount in controversy between appellant and respondent exceeding \$200.

The appeal is therefore dismissed at cost of appellant.

MORRIS, C. J., CHADWICK, MOUNT, and PARKER, JJ., concur.

[No. 11959. *En Banc*. June 23, 1915.]

C. A. TAYLOR, *Respondent*, v. B. A. PARISH, *Appellant*.¹

BILLS AND NOTES—ORDERS ON FUND—QUALIFIED ACCEPTANCE—CONSTRUCTION—EVIDENCE—TO EXPLAIN WRITING—AMBIGUITY. An order by loggers to pay the sum of \$1 per M. up to the amount and as the sum may become due them on logs as per contract with the defendant, which was accepted by the defendant "as the amount is due" to the loggers, is ambiguous as limited by the acceptance, and admits of parol evidence to the effect that all the parties knew that the loggers were without funds, that advances to them by the defendant had been and were necessary, that there was no profit in the logging operations, and that nothing became due to the loggers, although subsequent to the acceptance enough logs were put in at \$1 per M. to pay plaintiff's claim had no further advance been made; and there could be no liability on the acceptance, since it is clear that defendant did not intend to guarantee profits to the loggers, and the parties understood that the logging contract was to carry itself.

Appeal from a judgment of the superior court for Cowlitz county, Darch, J., entered January 13, 1914, upon findings in favor of the plaintiff, in an action upon an accepted order, tried to the court. Reversed.

Imus & Gore, for appellant.

Loyal H. McCarthy and *Magill, McKenney & Brush*, for respondent.

PER CURIAM.—This cause was originally set for hearing during the October term, 1914, at which time counsel for appellant appeared. Counsel for respondent failed to appear.

¹Reported in 149 Pac. 635.

An opinion was filed January 8, 1915. Subsequently a showing was made by counsel for respondent as to his failure to receive notice of the hearing because of an imperfect copy of the docket received by him. Thereupon the opinion was withdrawn and the cause again assigned for hearing during the May term, 1915. The majority of the court now hold that a correct conclusion was reached on the first hearing, and the opinion then filed is now adopted as the opinion of the court.

This is an action to recover upon an accepted order. The suit is prosecuted by the assignee. There was a judgment for the plaintiff as prayed for. The defendant has appealed.

The facts are these: In the fall of 1910, the firm of F. B. Mallory & Company, as the selling agent for Macomber & Whyte Rope Company, sold to the firm of Fowler & Quigley a quantity of wire rope for use in logging operations which they were then carrying on for the appellant. Mr. Mallory testified that the invoices were not paid when due; that Fowler & Quigley gave two promissory notes in settlement of the account, and that, just before the first note was due, Mr. Fowler advised that he would not be able to pay it, and asked if they would be satisfied to take an order on the appellant; that Fowler showed him a contract between the firm of Fowler & Quigley and the appellant, under which they were operating; that, in pursuance of the conversation, Fowler & Quigley gave him an order upon the appellant Parish as follows:

"Portland, Ore., May 11, '11.

"To Mr. B. A. Parish: Please pay to F. B. Mallory & Co. the sum of \$1.00 per M. Scale up to amt due them (one and no-100 dollars) as the sum may become due me on logs as per my contract with you. The above is to apply on logs that I may put in in excess of the 1,300,000 feet logged previous to this date. Fowler & Quigley, by Wallace Fowler."

that he presented the order to appellant, who indorsed his acceptance upon it in the following language: "O. K. as the amount is due Fowler & Quigley. B. A. Parish."

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The contract between Fowler & Quigley and the appellant bears date the 16th of November, 1910. By the terms of the contract, it was agreed that Fowler & Quigley should proceed without delay to build logging roads, arrange all necessary equipment, and log into floating water in the Coweeman river, within a period of eight months, barring unavoidable accident, all the timber standing upon certain described land, for four dollars per thousand feet "log scale at the Coweeman Driving & Rafting Co.'s boom." It was further agreed that Fowler & Quigley should employ experienced fallers, buckers, and woodsmen to conduct the logging operations along economic lines with minimum breakage; that they should cut the timber in such lengths as would saw out and market to the best advantage as the appellant should designate. It was further agreed "that \$3.75 of the above contract price is to be paid to the party of the second part [Fowler & Quigley] when logs are rafted and scaled by Coweeman Rafting and Driving Company." It was further agreed that twenty-five cents of the contract price should be retained by the appellant until the completion of the contract as a forfeit and guaranty of the fulfillment and faithful performance of the contract by Fowler & Quigley, and that their failure "to comply herewith is hereby made a forfeiture of the remaining twenty-five cents, and the further payment of the same by the party of the first part is hereby canceled." The contract contains a further clause for liquidated damages in case Fowler & Quigley should quit work before the contract was completed, and provides that "time and the exact performance of this contract be the essence thereof."

Both parties treated the acceptance as ambiguous, and offered parol testimony as to the actual agreement between Mallory & Company and the appellant at the time the latter indorsed his acceptance upon the order. Mr. Mallory testified in substance that, when he presented the order to the appellant, he told him that Mr. Fowler had shown him the contract upon which they were operating, and that he asked

the appellant if he would accept the order "on that basis, and he said he would;" that the appellant said that Fowler & Quigley had then put in about 1,300,000 feet of logs and, as the money came due in excess of that amount, he would pay the one dollar per thousand. He further said that the appellant gave him "to understand the one dollar a thousand would be paid as the logs were put in" in excess of the 1,300,000 feet, and that there was nothing said about any other conditions. He further testified that the appellant told him that he had made some advances to Fowler & Quigley which were covered by the 1,300,000 feet of logs.

The appellant was asked, "Did you tell him (Mallory) you had to make advances?" and answered: "I did, as his testimony showed this morning. He realized there were advances made. He knew it and knew there was nothing due them at the time on the contract." He said that Mr. Mallory did not discuss the details of the contract with him; that the contract was not discussed between them "or even mentioned;" that he told Mr. Fowler if money became due Fowler & Quigley on the contract, instead of paying it to them, "I would pay it to him," and that he accepted the O. K. on that condition; "otherwise I would not accept that at all. I told him I would not. There wasn't anything due them and I did not know when there would be anything due owing to making advances." It was stipulated that sufficient logs were scaled and put in the boom in excess of the 1,300,000 feet at one dollar a thousand to pay the respondent's claim. The court found all the issues in favor of the respondent.

If the order as limited by the acceptance is ambiguous, which we think it is, the burden of proof was upon the respondent to prove a right to recover. It is clear that Mallory & Company, at the time they accepted the order, knew that Fowler & Quigley were without funds. They knew that they had delivered 1,300,000 feet of logs which had been paid for in advances. They knew that Fowler & Quigley had not been able to pay for the equipment which they had

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bought of them to use in logging. They knew that they were without funds with which to conduct the logging operations. This was known by all the parties to the contract. It must have been within the contemplation of the parties that the logging contract should carry itself, and that the appellant was not undertaking to guarantee that a profit would result from it. This appears from an inspection of the order and the acceptance. It is clear that Fowler & Quigley undertook to appropriate one dollar per thousand feet upon all logs thereafter delivered into the boom. The appellant, apparently realizing that there might not be such profit, limited his acceptance. The testimony shows conclusively that there was no profit at all in the logging operations. Indeed, the appellant paid for supplies and labor, direct to the parties furnishing the supplies and the labor, several thousand dollars in excess of the contract price. If he is held liable in this action he will sustain an additional loss to the extent of the recovery. It is true that the logging contract provides that \$3.75 per thousand feet shall be paid to Fowler & Quigley when the logs "are rafted and scaled by the Coweeman Rafting and Driving Company," and it was stipulated that sufficient logs have been rafted and scaled in excess of the 1,800,000 feet to pay the respondent's claim. However, nothing ever became due Fowler & Quigley for the reason, as we have said, that the contract price was more than consumed in supplies and labor which the appellant paid direct to the parties who furnished these commodities.

By placing ourselves in the situation of the drawees and the acceptor at the time of the acceptance, with the light which they had on the matter, it becomes clear that the appellant merely undertook to pay the drawees any sum due Fowler & Quigley in excess of the actual expenses of the logging operations to the extent of the claim which the drawees represented. These operations resulted in a deficit instead of a profit and there can be no recovery. *Lawrence*

v. Phipps, 67 Hun 61, 22 N. Y. Supp. 16; *Haseltine v. Dunbar*, 62 Wis. 162, 22 N. W. 165.

The judgment is reversed, with directions to dismiss the action.

[No. 12449. Department One. June 23, 1915.]

GEORGE R. GARDNER, as *Guardian etc.*, *Respondent*, v.
DORCAS M. SPALT, *Appellant*.¹

WITNESSES—IMPEACHMENT—IMMORALITY. Upon the cross-examination of a witness, she may be required to answer as to whether she had not been convicted of keeping a house of prostitution.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. It is not necessarily prejudicial error to receive in evidence upon cross-examination a letter containing self-serving declarations that were immaterial, instead of permitting only the material part to be read to the jury, where, on request, the court instructed the jury to disregard the improper parts.

SAME—REVIEW—ERROR INVITED BY APPELLANT. Error cannot be predicated upon the admission of the entire record in a certain case, where the error was invited by appellant by insisting that the whole record go in, upon the offer of only a part of it.

SAME—REVIEW—HARMLESS ERROR—INSTRUCTIONS. It cannot be assigned that a general instruction upon the limitation of certain evidence is insufficient where no more specific instruction was requested.

TRIAL—SCOPE OF EVIDENCE—REBUTTAL. Where respondent had been satisfied to submit a check as bearing its own evidence of a different handwriting, and appellant undertook to establish that it was in the handwriting of the drawer, and so testified, it is not prejudicial error to allow a handwriting expert to testify in rebuttal that part of it was not in the drawer's handwriting.

APPEAL—RECORD—STATEMENT OF FACTS—IMPROPER ARGUMENT. Error cannot be predicated upon improper argument to the jury, not disclosed by the statement of facts and shown only by affidavits in support of a motion for a new trial.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered May 26, 1913, upon the verdict

¹Reported in 149 Pac. 647.

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of a jury rendered in favor of the plaintiff, in an action to recover money paid. Affirmed.

H. W. Lueders, for appellant.

Everal R. Vaughn and *F. W. Greenman*, for respondent.

CHADWICK, J.—Nels Martenson has been a victim of a recurring insanity since the year 1896, when he was first committed to an asylum in this state. He was committed and discharged several times. For some time prior to June 10, 1912, he had been employed as a laborer and section boss by the Oregon-Washington Railway & Navigation Company. He had accumulated and had on deposit in a local bank in Tacoma about \$700. For a long time, he had made his home at a hotel kept by the appellant. About June 17, 1912, he again became ill. He was treated by Dr. James, the company's physician, and was on his advice recommitted to the asylum on August 6 of that year. He was discharged as improved December 12, and sometime about January 1, 1913, was recommitted.

On or about June 10 or 18, 1912—the testimony is not clear or satisfactory—Martenson signed a check in favor of the appellant for \$690. The check is dated August 1, 1912, it being explained that, if the money was taken out of the bank before that time, accumulated interest would be lost. A guardian for the estate of Martenson was thereafter appointed, who brought this suit to recover the amount realized upon the check by appellant.

It is insisted by appellant that Martenson was owing her about \$1,200 for room and board and that the check was given in part payment of the account. We shall not recite the many details which must have been considered by the jury and which inhere in its verdict. It is enough to say that there is testimony and inferences from testimony which, if believed, is sufficient to warrant the jury in finding that Martenson was insane at the time the check was drawn. This

conclusion disposes of the assignment of error going to the overruling of a motion for a nonsuit.

The appellant was asked if she had not been convicted of the crime of running a house of prostitution, and was required to make answer by the court. This was not error. The holding was within the rule laid down in *State v. Coella*, 3 Wash. 99, 28 Pac. 28; *State v. Blaine*, 64 Wash. 122, 116 Pac. 660; *State v. Stone*, 66 Wash. 625, 120 Pac. 76; *State v. Overland*, 68 Wash. 566, 123 Pac. 1011; *State v. Jackson*, 83 Wash. 514, 145 Pac. 470.

On the direct examination of Dr. Snook, who had treated Martenson for a short time, he was asked if he had received a letter from Mr. Vaughn, attorney for the estate, the object being to justify an inquiry made by the doctor as to the giving of the check to appellant and whether Martenson was sane at the time, or, being thereafter sane, ratified his act by expressing satisfaction with what he had done. On cross-examination, after proper identification, the letter and the answer to it were admitted. The reception of Mr. Vaughn's letter is assigned as error. It does contain matter that is immaterial, and it would have been better to have rejected it entirely or permitted only that part of it that might be material to be read to the jury, but we are not disposed to hold the error prejudicial.

Counsel for appellant objected because "parts of it are not proper here, and parts of it are self serving declarations." The court then said: "I think considering it is a matter you brought out about Mr. Vaughn's letter that both letters may be admitted." To which Mr. Lueders responded: "I want the court to instruct the jury concerning the latter part of the letter." The court accordingly instructed the jury:

"That the declarations made by E. R. Vaughn in his letter to Dr. Snook Jan. 20, 1913, can not be considered as facts in the case, but the letter is admitted merely as bearing on the statements of Dr. Snook in this case."

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We cannot assume that the jury wilfully ignored this instruction. Neither is it clear to us that any exception was taken to this instruction, nor did appellant request an instruction upon this phase of the case. Jurors are usually possessed of common understanding and, in the absence of a showing to the contrary, are presumed to have followed the directions of the court.

Error is also assigned in that the court permitted the introduction of all of the proceedings in the probate department of the court upon which the guardianship is founded. Certain affidavits tending to show the mental condition of Martenson were attached to the petition. The record as made is as follows:

"Mr. Greenman: By reason of the fact that counsel changed his admission made at the opening of the trial, we wish to offer the records in the matter of the guardianship of Nels Martenson, 8283, of this court, including the order of Judge Clifford authorizing this suit. Mr. Lueders: We object to the record, because it contains statements of facts and affidavits. The Court: Is it for the purpose of showing the right to bring this suit under order of the court? Mr. Greenman: That is the only object. The Court: Well, let the order be offered. Mr. Greenman: We wish also to offer the original notice and petition for appointment as guardian, in view of the fact that they have brought in a witness and testified that Mr. Vaughn asked for his own appointment. Mr. Lueders: I think I do not want the order to go in unless the whole record goes in. I do not think the order is competent for the reason that it assumes, and the jury might assume from the order, that Judge Clifford had determined the merits of this case. The Court: I will instruct the jury on that point. The entire record will be admitted."

If this was error it was invited by counsel and will not avail appellant. *Davidson Fruit Co. v. Produce Distributors Co.*, 74 Wash. 551, 134 Pac. 510; *Olson v. Carlson*, 83 Wash. 415, 145 Pac. 237; *Lantz v. Moeller*, 76 Wash. 429, 136 Pac. 687, 50 L. R. A. (N. S.) 68.

The court instructed as follows:

"The court instructs the jury that an order was made by Judge Clifford of this court, authorizing the guardian in this case to bring this action. You are not to consider that fact in any way as bearing on the merits of this case. This case is to be determined by you solely on the evidence adduced upon this trial."

No more specific instruction was requested. It would follow, then, that, whether the error was invited or not, the assignment is without merit under the theory applicable to the assignment last before discussed.

It is claimed that the court committed error in permitting a witness who had qualified as an expert in handwriting to testify in rebuttal that a part of the check was not in the handwriting of Martenson. We think that the verdict of the jury should not be set aside for this reason. It is evident that respondent, after asking a witness in chief to express an opinion which he immediately qualified by an observation that he did not want to pose as an expert without having something more to go by than a bare signature, was satisfied to submit the check as bearing its own evidence of a different handwriting in so far as the amount was concerned. Appellant seemingly accepted this theory, for she undertook to establish the fact that the check was in the handwriting of Martenson. She so testified. The state of the record at the time of the offer was such as to justify the admission of the testimony.

Error is predicated upon the giving and refusal to give instructions. We have read and compared the instructions given and refused and find no error. The jury was fully and fairly instructed upon every phase of the case.

Finally, it is contended that counsel was guilty of misconduct in addressing the jury. Granting, without deciding, that this is so, the statement of facts does not disclose the improper language or the rulings of the court. Error in this regard cannot be predicated, and will not be considered

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Statement of Case.

by this court, upon the affidavits submitted in support of a motion for a new trial. *State v. Meyerkamp*, 82 Wash. 607, 144 Pac. 942; *State v. Johnston*, 88 Wash. 1, 144 Pac. 944.

Affirmed.

MORRIS, C. J., HOLCOMB, MOUNT, and PARKER, JJ., concur.

[No. 12457. Department One. June 23, 1915.]

CHARLES PETROVITSKY, *Appellant*, v. W. E. SMITH *et al.*,
Respondents.¹

FRAUDULENT CONVEYANCES—HUSBAND AND WIFE—CREDITORS. Upon an issue as to whether a deed from husband to wife, presumptively fraudulent as to creditors, under Rem. & Bal. Code, § 5229, was made in good faith, unliquidated claims for damages or an existing right of action upon a contingent claim do not stand upon the same footing as would be given to existing acknowledged or contract debts.

SAME—HUSBAND AND WIFE—EVIDENCE—SUFFICIENCY. Where a husband had no debts except an unliquidated demand, his deeds to his wife and children of certain property, for the expressed consideration of one dollar, are sufficiently shown to have been made in good faith, where it appears that, at the time the houses were built on the lots, it was agreed that one should be given to the children and one to the wife, that the wife had reared and educated the children largely through her own efforts, and with the children had paid back taxes and street assessments, and renewed a mortgage, and she had put in \$500 received as a legacy from a friend, and the husband, living separate and apart, had contributed but little to the family support; the only suspicious circumstance being that the deeds were not promptly recorded.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 8, 1914, dismissing an action to cancel deeds, tried to the court. Affirmed.

R. B. Brown, for appellant.

Ryan & Desmond, for respondents.

¹Reported in 149 Pac. 641.

CHADWICK, J.—Appellant is a judgment creditor of the respondent W. E. Smith, and brings this action to set aside two deeds to property conveyed by Smith, the one to his wife, and the other by Smith and wife to Smith's son and daughter by a former marriage.

In March, 1906, in consequence of certain antecedent transactions between appellant and respondent W. E. Smith, an assignment of a real estate contract was made by Smith to appellant. The title failing after a suit to enforce specific performance, appellant began an action against Smith in July, 1909, and took judgment by default August 13, 1909. On March 18, 1909, Eugenia E. Smith, wife of W. E. Smith, filed for record a deed signed by W. E. Smith of date January 14, 1907, acknowledged August 15, 1908, purporting to convey, in consideration of one dollar, the east half of lots 11 and 12, in block 10, Law's Second addition to Seattle. On August 3, 1909, William E. Smith, Jr., and Florence E. Smith, son and daughter of W. E. Smith, filed for record a deed executed by W. E. Smith dated March 17, 1909, acknowledged on the same day, purporting to convey, in consideration of one dollar, the west half of the same property. A house had been built on each tract. On the 8th day of August, 1913, appellant commenced this action to set aside the conveyances as fraudulent and to subject the property to the lien of his judgment. After a hearing on the merits, a decree denying the prayer of plaintiff's complaint was entered by the court.

It is earnestly contended that the deed to the wife is presumptively fraudulent under Rem. & Bal. Code, § 5229 (P. C. 135 § 1459), which provides, when such deeds are called in question, that "the burden of proof shall be upon the party asserting the good faith." The only question is one of good faith and burden of proof. We have carefully read the record and have endeavored to measure the circumstances relied on by both sides. At the time when the deeds were executed, it seems to be established that Mr. Smith had no

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debts except the unliquidated demand of the appellant. Whether he had notice of this is a disputed fact, but upon all the evidence we are disposed to hold, as the trial court must have held, that respondents sustained the burden of proof.

Admitting that a conveyance might be fraudulent as against an unliquidated claim for damages, or an existing right of action upon a contingent claim, we think it would be going too far to give such claims the same standing, when considering inferences only, as would be given to existing acknowledged or contract debts. Good faith is a question of intent, and such conveyances must be considered in the light of § 8766 (P. C. 95 § 47) as well as § 5229 (P. C. 135 § 1459).

It is established by a preponderance of the evidence that it had been understood from the time the two houses were built on the property that one of them should be given to Mrs. Smith and one to the children. Mrs. Smith was a second wife who had reared the two children and, largely by her own efforts, had put them through the schools and had kept them for some time at the university. The record is not entirely clear, but in the absence of a positive showing to the contrary, the inference is impelled that Mr. Smith, whose deposition was taken in Chicago, is some years older than his wife and is not now living with or helping the family to any great extent; that the burdens of the family have fallen upon Mrs. Smith; that Mr. Smith has not contributed much to their support since the summer of 1909; that both children quit school and went to work; that Mrs. Smith has cooked, sewed and, at the time of the trial, was working in a department store; that the three of them had paid back taxes and street assessments, had renewed a mortgage of \$2,000 upon the property at some expense, and that Mrs. Smith had put \$500, which she had received as a legatee under the will of a friend, into the property. As against these cir-

cumstances, about the only circumstance from which a fraudulent intent might be inferred is the fact that the deed to the wife was not promptly delivered and filed for record. A similar circumstance was rejected as insufficient when standing alone, in the case of *Smith v. Weed*, 75 Wash. 452, 134 Pac. 1070, where we said:

"The things urged as casting suspicion on this deed are the fact . . . that the deed was not recorded until September 24, 1910, some ten days after the fire . . . But both of the appellants testified positively that the deed was executed and delivered on February 7, 1907, and the notary testified that he thought so. We think the evidence wholly insufficient to warrant a finding that these thirteen lots were community property."

Upon the whole case, we are not prepared to say that the respondents have failed to meet the burden put upon them by the statute by clear and convincing testimony.

Wherefore, the judgment is affirmed.

MORRIS, C. J., PARKER, and MOUNT, JJ., concur.

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Syllabus.

[No. 12854. Department One. June 23, 1915.]

THE STATE OF WASHINGTON, *on the Relation of Washington
Public Service Company et al., Plaintiff, v. THE
SUPERIOR COURT FOR PIERCE COUNTY et al.,
Respondents.*¹

EMINENT DOMAIN—PROCEEDINGS—APPEAL—BOND—NECESSITY. Under the general condemnation act, Rem. & Bal. Code, § 931, providing that no bond on appeal shall be required of any person interested in the property sought to be condemned, an appeal or supersedeas bond is not required upon appeals from an award of damages in condemnation proceedings, and the general statute of appeals, Id., § 1721, requiring a bond on appeal to make the appeal effectual does not apply.

SAME—PROCEEDINGS—COMPENSATION—APPEAL—POSSESSION PENDING APPEAL. Upon the condemnation of a water system of a public service corporation, the city electing to finance the acquisition under Rem. & Bal. Code, § 8008, without recourse to a general indebtedness, by creating a special fund derived from gross revenues and the issuance of bonds and warrants against the special fund, in which the jury awarded damages in the sum of \$88,500, while the bond issue authorized by the vote of the people amounted to but \$90,000, it cannot be assumed, on appeal from the award, that, upon a reversal and a new trial, a second verdict might be rendered in excess of the legally authorized indebtedness for which the property owner would have no redress, but it must be presumed until the contrary is shown that the trial by jury was fair and regular; hence Const., art. 1, § 16, guaranteeing that no property shall be taken or damaged without just compensation having been first made or paid into court and ascertained by a jury, is not violated by Rem. & Bal. Code, § 7783, providing that no appeal shall delay the proceedings if the city shall pay the amount of the award into court and that the city shall be liable to the owner for any further compensation that may be finally awarded to the party appealing, and § 7784, authorizing the city to take possession upon payment of the award; hence the property owner, on appealing from the award, is not entitled to a writ of prohibition staying the proceedings until the final hearing on the appeal.

SAME—PROCEEDINGS—POSSESSION—DAMAGES—ACCOUNTING—EARNINGS PRIOR TO PAYMENT. Upon the condemnation of a water system of a public service corporation, under Rem. & Bal. Code, §§ 7783,

¹Reported in 149 Pac. 652.

7784, entitling the city to take possession upon the payment of the jury's award of damages, the city is not entitled to an accounting of the earnings and profits of the condemned property previous to the payment of the money, although, upon such payment, the title relates back to the date of the award.

Application filed in the supreme court May 15, 1915, for a writ of prohibition to the superior court for Pierce county, Clifford, J., to prohibit the entry of a decree in condemnation proceedings. Denied.

Frank C. Owings and Hardy, Woodley & Behrends, for relators.

George R. Bigelow and P. M. Troy, for respondents.

HOLCOMB, J.—Olympia, a city of the third class of the state of Washington, by appropriate resolutions and ordinances under the public utilities act of 1909, found in Rem. & Bal. Code, §§ 8005 to 8010 (P. C. 77 §§ 1073-1083), began proceedings to condemn and purchase the water system and plant belonging to the Washington Public Service Company, a corporation, located in and supplying the city of Olympia. After appropriate preliminary proceedings, a change of venue being taken from the superior court of Thurston county to the superior court of Pierce county, a trial was had therein by the jury for the ascertainment of the compensation proper to be paid by the city to the owners of the property. The jury returned a verdict fixing the compensation at \$88,500, and judgment was entered for that sum, together with costs of suit, against the city and in favor of the property owners, on April 24, 1915. On May 11, 1915, the condemning city offered a formal decree, to be entered in said cause, appropriating the property condemned, and therewith offering to pay into court the amount of the award and costs as taxed; and further providing that the property owners should account for the profits and earnings of the property from and after the date of the award of the jury on April 20, 1915, together with interest from the date of

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the verdict to the date of payment. The relators seek to prohibit the trial court from making or entering a decree of appropriation as proposed in the cause, "wherein or whereby possession of the plant and property of the relators shall be granted to said respondent city pending the hearing and determination of the appeal of said relators to the supreme court of the state of Washington in said cause, and until the final determination of said controversy and until the entering of a final judgment herein, and further prohibiting the respondent court from requiring the relators or the Washington Public Service Company, a corporation, from making any final accounting pending the appeal and until a final adjudication of the rights of the parties shall have been made and determined." A notice of appeal from the award and judgment was given by relators on May 11, 1915.

The respondents filed a return to the petition for the writ herein, and admitted each and every allegation contained in the petition, but, among other things, alleged that no appeal bond has ever been filed with the clerk of the superior court of Pierce county nor any money, in the sum of \$200 or any other sum, deposited with the clerk of said court by the relators in lieu of such bond, as provided in Rem. & Bal. Code, § 1721 (P. C. 81 § 1193), and no provision has been made or offered by the relators for the filing of a supersedeas bond conditioned that the relators shall pay all rents of, or damages to, the property held by them accruing during the pendency of the appeal, as provided for by Rem. & Bal. Code, § 1722 (P. C. 81 § 1195); that the time in which the appeal to the supreme court of this state must be taken began to run on April 24, 1915, and expired on May 24, 1915, or thirty days from the filing of the judgment appealed from, as provided in Rem. & Bal. Code, § 7818 (P. C. 171 § 131).

Upon this showing, respondents contend that relators' notice of appeal is ineffectual and has no vital force because of

no bond or supersedeas being given. Section 1721, Rem. & Bal. Code, provides:

"An appeal in a civil action or proceeding shall become ineffectual for any purpose unless at or before the time when the notice of appeal is given or served, or within five days thereafter, an appeal bond to the adverse party conditioned for the payment of costs and damages as prescribed in § 1722, be filed with the clerk of the superior court, or money in the sum of two hundred dollars be deposited with the clerk in lieu thereof."

And § 1722, Rem. & Bal. Code, provides that:

". . . in order to effect a stay of proceedings as in this section provided, the bond, where the appeal is from a final judgment for the recovery of money, shall be in a penalty double the amount of the damages and costs recovered in such judgment and in other cases shall be in such penalty, not less than two hundred dollars, and sufficient to save the respondent harmless from damages by reason of the appeal, as a judge of the superior court shall prescribe."

The respondents' condemnation proceedings were brought under the general condemnation act, Rem. & Bal. Code, §§ 921 to 936 (P. C. 171 §§ 173 to 281). Section 931 of that act provides that no bond shall be required of any person interested in the property sought to be appropriated by such corporation, upon appeal by such property owner. These proceedings being in the nature of special proceedings, it would seem that the general statutes relating to appeals in civil cases do not apply, and that no bond is required to be given by the condemnee appealing from a judgment of award in condemnation proceedings. We cannot, therefore, hold that the notice of appeal given by the relators in this case, and admitted by the respondents, is ineffectual.

The principal contention of the relators is that there is no warrant of law for a transfer of title or possession pending an appeal from a judgment assessing the compensation. Relators admit that, by the provisions of the public utilities

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act of 1909, Rem. & Bal. Code, §§ 8005 to 8010, inclusive, the city of Olympia is authorized to acquire water works and other public utilities by purchase or condemnation, but point out that two methods are provided for financing the acquisition of the property purchased or condemned; one, by the creation of a general indebtedness, and the other by the creation of a special indebtedness and without the creation of any general liability or obligation on the part of the city. In either event, the proposed acquisition must be submitted to a popular vote. If a general indebtedness is to be incurred, the proposition must be adopted and ratified by three-fifths of the qualified voters of the city voting at such election. If no general indebtedness is to be incurred, such proposition may be adopted by a majority vote. Rem. & Bal. Code, § 8008 (P. C. 77 § 1078), evolves a scheme for financing the acquisition of a public utility without recourse to the creation of a general indebtedness. This scheme requires the creation of a special fund into which the city shall be bound to pay each year a fixed proportion of the gross revenues of the public utility so acquired, and provides for the issuance of bonds or warrants against this special fund, which bonds or warrants shall be a valid claim in favor of the holder thereof only as against such special fund and its fixed proportion or amount of the revenue pledged to such fund, and shall not constitute an indebtedness of such city or town within the meaning of the constitutional provisions and limitations. It appears that the city of Olympia proceeded under this special form of financing the acquisition of the relators' plant. From this the relators contend that the city and its authorities are in this matter wholly without the power to bind the general credit of the city or its tax laying power, and that, therefore, the award of \$88,500 for the acquisition of the relators' property might not be sufficient if upon appeal the award below were set aside and a new trial ordered and an increased award made by a jury. The city

and the court below intended to proceed under Rem. & Bal. Code, § 7788, the material parts of which are as follows:

"Any final judgment or judgments rendered by said court [the superior court] upon any finding or findings of any jury or juries, . . . shall be final and conclusive as to the damages caused by such improvement unless appealed from, and no appeal from the same shall delay proceedings under said ordinance, if such city shall pay into court for the owners and parties interested, as directed by the court, the amount of the judgment and costs, and such city, after making such payment into court, shall be liable to such owner or owners or parties interested for the payment of any further compensation which may at any time be finally awarded to such parties so appealing in said proceedings, and his or her costs, and shall pay the same on the rendition of judgment therefor, and abide any rule or order of the court in relation to the matter in controversy. In case of an appeal to the supreme court of the state by any party to the proceedings the money so paid into the superior court by such city, as aforesaid, shall remain in the custody of said superior court until the final determination of the proceedings."

It is further provided by Rem. & Bal. Code, § 7784, as follows:

"The court, upon proof that just compensation so found by the jury . . . together with costs, has been paid to the person entitled thereto, or has been paid into court as directed by the court, shall enter an order that the city or town shall have the right at any time thereafter to take possession of or damage the property in respect to which such compensation shall have been so paid or paid into court, as aforesaid, and thereupon, the title to any property so taken shall be vested in fee simple in such city or town."

The total sum authorized by the electors to be raised by special fund bonds in the proceedings under consideration is \$90,000. Relators, therefore, contend that conceivably a second verdict might be twice or three times the amount of the first verdict, and in such case the city has no power to render itself generally liable and bound for the payment of such increased sum, and the relators would be without remedy.

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The relators also urge that, under the state constitution, art. 1, § 16, they are guaranteed that their property shall not be taken or damaged for public or private use without just compensation having been first made or paid into court for them, which compensation shall be ascertained by a jury unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law; and they further urge that a trial by jury is guaranteed by the constitution, that an appeal is guaranteed to them by the constitution, and that the guarantee of trial by jury is not fulfilled until an appeal has been taken, the appeal is passed upon, and the court of last resort has determined whether or not they had a fair trial by jury according to the constitution and the law of the land.

The right to take property for public use without the consent of the owner is the right of eminent domain and belongs alone to the sovereign, but embraces all the cases where, by the authority of the sovereign and for the public good, the property of the individual is taken, without his consent, for the purpose of being devoted to some particular use, either by the state in its sovereign capacity, or by a corporation, public or private, or by a private citizen to whom such right has been granted by the state. Lewis, Eminent Domain (3d ed.), § 1. The right of eminent domain is limited only by the constitution, and the only limitation in this state is that private property shall not be taken for an alleged public use without compensation being first ascertained by a jury, and made or paid into court for the benefit of the owner. In this case, it was shown that a trial by a jury was had, and the principle invoked by the relators would, in effect, be that, upon a notice of appeal being given, this court must presume that the right of trial by jury was violated; or, in other words, that the appellant did not have a fair and impartial trial by jury according to the law of the land. But a contrary presumption holds. It must be presumed that

the trial by jury was regular and according to the law of the land, until the contrary is shown. Until the record of that trial is before us, we cannot assume that the appellant in that case did not have a fair trial by jury as guaranteed by the constitution.

The statutes of eminent domain further provide that the only question that can be determined on an appeal from the award by the jury is the amount of the award. Under constitutions and statutes like ours, we know of no case where it has not been held that the constitutional guaranty is sufficiently complied with where, after an award has been made in due form of law, the condemner pays the amount of the award into court or pays it to the property owner who accepts it. If the property owner does not accept it and the condemner pays it into court, that complies with the constitutional requirement. The law simply gives the condemning party the right to possession of the property for the purposes for which it was condemned. He has the lawful right to enter upon the property and take possession of it from the time that he accepts the award of the jury and pays the amount of the award to the property owner or into court for his benefit. As was said by the chancellor in *Beekman v. Saratoga & S. R. Co.*, 3 Paige Ch. (N. Y.), 45, 22 Am. Dec. 679:

"From the moment that compensation was paid or deposited as the law had directed, the right to this property was absolutely vested in the defendants for the use of the railroad [the condemner], and they have a perfect right to enter upon it and appropriate it to that use."

The time, manner, occasion, and method of the exercise of the right of eminent domain are wholly in the control and discretion of the legislatures of the states, except as restrained by the constitution. *Lewis, Eminent Domain* (3d ed.), § 238; *Secomb v. Milwaukee & St. Paul R. Co.*, 49 How. Pr. 75; *Swan v. Williams*, 2 Mich. 427; *Weir v. St. Paul, S. & T. F. R. Co.*, 18 Minn. 155; *Roanoke City v. Berkowitz*, 80 Va. 616; *Consumers' Gas Co. v. Harless*, 131 Ind. 446,

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29 N. E. 1062, 15 L. R. A. 505; *First Nat. Bank of Butte v. Boyce*, 15 Mont. 162, 38 Pac. 829; *State v. Dickson*, 3 Mo. App. 464; *In re Rainier Avenue*, 80 Wash. 688, 141 Pac. 1187.

We cannot anticipate that a new trial will be granted upon the appeal by relators, or that, in case a new trial is granted, a second verdict would be greater than the first. We might as well anticipate that a second verdict would be much less than the first as that it would be greater. In case it is less, then the relators have not been injured by the enforcement of the judgment in compliance with the statutes referred to. In case it is greater, the respondents must meet that trouble when it arises. Upon the principal grounds urged by the relators, therefore, we do not believe that they are entitled to a writ prohibiting the entry of the judgment and possession by the condemner. We desire to point out, however, that the form of the judgment offered, and which it is the superior court's alleged intention to enter, provides for an accounting from the date of the award of the jury of April 20, 1915. We assume that this is an inadvertence. Upon due consideration, the superior court would doubtless correct that provision. The city is entitled to no accounting of the earnings and profits of the condemned property previous to the payment of the money to the property owner or into court for his benefit. The property is not taken until the condemner elects to pay the award. Upon that event, the title relates back to the award, but the benefits incident to and accruing from possession do not. The condemner may elect not to pay it at all, and if it so elects, the property owner has no right in the amount of the award. *State ex rel. Struntz v. Spokane County*, 85 Wash. 187, 147 Pac. 879. If it elects to pay the award and does so, or deposits it in court for the owner, from that time, and that time only, it is entitled to possession of the property under our statutes, with all the rights incident thereto. If, afterwards, the condemner loses the property as a result of the judicial proceed-

ings, it would be compelled to account to the owners for the rents, issues and profits received by it while in possession.

We can only grant or deny the writ in whole. We assume that this minor matter pointed out in the proposed form of decree has only to be called to the attention of the respondents to be corrected and avoid the necessity of further proceedings in regard thereto.

The writ is denied.

MORRIS, C. J., MOUNT, and CROW, JJ., concur.

[No. 12558. Department One. June 24, 1915.]

HANS PEDERSON, *Appellant*, v. THE CITY OF TACOMA,
Respondent.¹

ACCORD AND SATISFACTION—COMPROMISE AND SETTLEMENT—PART PAYMENT—CONTRACT—PERFORMANCE. A complete accord and satisfaction is shown, where a city contractor, claiming \$108,000 for extras on a million dollar contract, after the city's expert engineer found extra work to the amount of \$47,000, less deductions in the sum of \$25,100, and after conferences with the city council, entered into a written contract to accept \$61,342, in bonds as the balance in full, and thereafter was paid the same, and receipted for the bonds in full satisfaction of the contract.

SAME. The accord and satisfaction of an unliquidated and disputed claim by acceptance in full of a certain sum is not affected by the fact that the debtor admitted the sum paid to be the amount due, as any sum may be agreed upon.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered May 27, 1914, upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

Corwin S. Shank and *H. C. Belt*, for appellant.

T. L. Stiles and *Frank M. Carnahan*, for respondent.

¹Reported in 149 Pac. 643.

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Opinion Per MOUNT, J.

MOUNT, J.—This action was brought to recover an alleged balance of \$88,818.65 as extras upon a contract with the city of Tacoma for the construction of the Nisqually electric power plant for the city. The answer of the city denied that there was any amount due from the city to the plaintiff, and alleged an accord and satisfaction entered into between the plaintiff and the defendant prior to the bringing of the action. The case was tried to the court without a jury. At the conclusion thereof, the court found that there had been an accord and satisfaction of the plaintiff's claims, and for that reason dismissed the action. The plaintiff has appealed.

We think there can be no doubt that there was a complete accord and satisfaction. It appears from the evidence that, in the year 1911, the defendant city entered into a contract with the plaintiff, whereby the plaintiff was to construct eight sections of the electric power plant for the agreed price of \$1,074,918.27. The plaintiff thereafter entered upon the work, which was finally completed. Thereafter the plaintiff made a claim against the city for something more than \$108,000 for extra work under the terms of the contract, and demanded payment thereof. The city thereupon employed an expert engineer to report upon the work. This engineer made a report showing that the plaintiff had performed extra work to the amount of \$47,119.37, from which deductions should be made in the sum of \$25,593.40. Thereafter several meetings were held between the members of the city council and the plaintiff, and it was finally agreed, on the 25th day of January, 1913, that the appellant would receive \$61,342.79 in full settlement of his claims under the contract. It was then agreed that the city council would adopt a resolution and pass an ordinance providing for the payment of this money, and that a special fund would be created out of which the money should be paid. This was all done by the council, and on January 31, 1913, the plaintiff formally accepted the resolution in writing as follows:

"Tacoma, Washington, Jan. 31, 1913.

"To the Honorable City Council of the City of Tacoma:

"Gentlemen: I hereby agree to accept the sum of \$61,342.79 as balance in full for the construction of sections one (1) to eight (8) inclusive, of the Nisqually power plant, under the terms and conditions of that certain resolution No. 6070, adopted by the city council of the city of Tacoma on the 29th day of January, 1913, upon the condition that the One Thousand Dollars (\$1,000) retained under the terms of the resolution, shall be paid to me as soon as the two items of cleaning up have been taken care of, and upon the further condition that the sum of \$60,342.79 is paid immediately in cash or valid warrants, and if in warrants, the same to bear interest at the rate of not less than six per cent (6%) per annum from the date hereof.

"Very respectfully, Hans Pederson,

"By Williamson, Williamson & Freeman,

"His Attorneys. By E. E. Freeman.

"Witness: Geo. G. Williamson."

Thereafter, upon the 20th day of February, 1913, the warrants and bonds were issued and delivered to the appellant, who acknowledged receipt thereof as follows:

"Received from the city of Tacoma the bonds provided for by the above ordinance, in full satisfaction of the contract for the balance of which the same were issued.

"Hans Pederson.

"Dated, Tacoma, Washington, February 20, 1913."

At the time of the trial, these bonds, and the warrants issued in pursuance of the agreement, had all been paid to the plaintiff. If there was no other evidence in the record, this is clearly sufficient to show an accord and satisfaction. But there is oral evidence strongly supporting this written evidence. The appellant, as we understand his contention, argues that, by reason of a recitation in the ordinance that the sum of \$61,342.79 is due from the city to the plaintiff, there can be no accord and satisfaction by payment of the amount that the city admitted to be due. The evidence establishes clearly that the city was contending that there was a much less sum due, and that the appellant was claiming a

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much larger sum; but by compromise an agreement was reached for the amount of \$61,342.79. There was, therefore, a complete accord and satisfaction.

But if we may assume that the city agreed that \$61,342.79 was due and that the appellant was claiming \$108,000, the parties might agree upon either sum, and that would be an accord and satisfaction. Where a claim is in dispute, the parties may agree upon an amount to be paid, which amount when paid will constitute an accord and satisfaction. The rule is well stated in 1 C. J., p. 551, § 71, as follows:

"Where a claim is unliquidated or in dispute, payment and acceptance of a less sum than claimed, in satisfaction, operates as an accord and satisfaction, in the absence of fraud, artifice, mistake, or imposition, as the rule that the receiving of a part of the debt due, under an agreement that the same shall be in full satisfaction, is no bar to an action to recover the balance, does not apply, where plaintiff's claim is disputed or unliquidated. Under these circumstances there is a sufficient consideration for the settlement. The fact that the creditor was not legally bound to make any abatement of his claim, or that the amount accepted was much less than the creditor was entitled to receive and would have recovered had he brought action, or that he was induced to accept a part of his claim, by fear that he would lose the whole of it, does not in any way affect the operation of the rule, and it is of no importance which of the parties was right in his contention, or that in fact they were both wrong."

Upon both the law and the facts, we are satisfied that the trial court was right in finding that there had been a complete accord and satisfaction, and the judgment is therefore affirmed.

MORRIS, C. J., HOLCOMB, PARKER, and CHADWICK, JJ.,
concur.

[No. 12691. Department One. June 24, 1915.]

ARTHUR LENHART, *Appellant*, v. THE CITY OF HOQUIAM,
Respondent.¹

MUNICIPAL CORPORATIONS—ACTIONS—CLAIMS—PRESENTATION. Under Rem. & Bal. Code, § 7998, requiring all claims for damages against a city of the third class to be filed within thirty days from the time when the claim accrued, all such claims to accurately locate and describe the defect that caused the injury, etc., and that no action shall be maintained for any claim for damages until the same is presented and sixty days have elapsed, it is necessary to file a claim either in actions *ex delicto* or *ex contractu* before the action can be maintained.

SAME—ACTIONS—COMPLAINT—CONSTRUCTION. An allegation that a city is a municipal corporation and was a city of the third class at the time plaintiff's first cause of action accrued and subsequent thereto, is an allegation that it is a city of the third class.

SAME—ACTIONS—PLEADING—CONDITIONS PRECEDENT—DEMURRER. Where the presentation of a claim against a city is a condition precedent to action, failure to file the claim is not a subject of defense, but must be alleged and may be taken advantage of by demurrer.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered September 16, 1914, upon sustaining a demurrer to the complaint, dismissing an action for breach of contract and for damages. Affirmed.

Arthur Lenhart, for appellant.

Sidney Moor Heath and *James P. H. Callahan*, for respondent.

MOUNT, J.—The trial court sustained a demurrer to the plaintiff's complaint in this action. The plaintiff elected to stand upon the allegations of the complaint, and the action was dismissed. This appeal followed.

The complaint states two causes of action. The first cause of action is to the effect that in June, 1910, the plaintiff leased to the defendant city a certain tract of land for a

¹Reported in 149 Pac. 650.

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period of one year from the first day of July, 1910; that the defendant entered upon the land in pursuance of the lease and used the land as a garbage dump until the first day of July, 1911; that, as a part consideration for the lease, the defendant agreed to burn or bury certain garbage deposited upon the land. It is then alleged that the defendant did not bury or burn said garbage, and did not surrender the land at the expiration of the lease, to the plaintiff's damage in the sum of \$800.

The second cause of action is to the effect that, after the first day of July, 1911, the defendant occupied the land and used the same for the purpose of a garbage dump; that the defendant agreed to pay the plaintiff the reasonable value for the use and occupation of the land; that \$25 per month is the reasonable value for the use of the land; that there is due and owing from the defendant the sum of \$800 for the use of the land; that on the 2d day of May, 1914, the plaintiff notified the defendant to vacate and quit the use of the land, but the defendant refused to quit and surrender the possession, and dumped dead horses and other animal offal and refuse upon the land, to the plaintiff's damage in the sum of \$100. There is no allegation, in either the first or the second cause of action, that any claim has been presented to the city of Hoquiam and disallowed by the city. The statute provides at § 7998, Rem. & Bal. Code (P. C. 77 § 57), as follows:

"All claims for damages against any city or town of the second, third or fourth class must be presented to the city or town council and filed with the city or town clerk within thirty days after the time when such claim for damages accrued, and no ordinance or resolution shall be passed allowing such claim or any part thereof, or appropriating any money or other property to pay or satisfy the same or any part thereof, until such claim has first been referred to the proper department or committee, nor until such department or committee has made its report to the council thereon pursuant to such reference. All such claims

for damages must accurately locate and describe the defect that caused the injury, accurately describe the injury and state the time when the same occurred, give the residence for six months last past of claimant, contain the items of damages claimed and be sworn to by the claimant. No action shall be maintained against any such city or town for any claim for damages until the same has been presented to the council and sixty days have elapsed after such presentation."

This court has frequently held that this and similar statutes are mandatory, and that it is necessary to file a claim with the city, either in actions *ex delicto* or *ex contractu*, before an action can be maintained thereon. *International Contract Co. v. Seattle*, 69 Wash. 390, 125 Pac. 152; the same case on rehearing, 74 Wash. 662, 134 Pac. 502; *Ransom v. South Bend*, 76 Wash. 396, 136 Pac. 365; *Collins v. Spokane*, 64 Wash. 153, 116 Pac. 663, 35 L. R. A. (N. S.), 840; *Benson v. Seattle*, 78 Wash. 541, 139 Pac. 501; *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820.

The appellant seeks to evade the force of the statute by saying that the complaint does not show that the city of Hoquiam is a city of the third class. But the first allegation of the amended complaint states:

"That defendant is a municipal corporation, duly incorporated and existing under the laws of the state of Washington, and, on the 25th day of June, 1910, and for several months prior, and also subsequent thereto, was a city of the third class."

This is clearly an allegation that the city of Hoquiam is, and was at the time these damages accrued, a city of the third class.

It is also claimed by the appellant that the failure to file a claim was a subject for defense, and not a ground of demurrer. But it is plain from the statute quoted that the plaintiff in such a case must allege facts showing that he is entitled to recover. It was therefore necessary for him to allege and prove that a claim had been presented to the city council within thirty days after the time when such claim for damages

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accrued, and that such claim was rejected. Not having done so, the complaint does not state a cause of action.

The judgment of the trial court is therefore affirmed.

MORRIS, C. J., HOLCOMB, PARKER, and CHADWICK, JJ.,
concur.

[No. 12656. Department One. June 25, 1915.]

KLAUS WIK, *Appellant*, v. T. J. KING *et al.*, *Respondents*.¹

APPEAL—REVIEW—DISCRETION—GRANTING NEW TRIAL. The granting of a new trial for insufficiency of the evidence is discretionary, and will not be reviewed on appeal except for abuse of discretion.

Appeal from an order of the superior court for King county, Smith, J., entered October 5, 1914, granting a new trial, after the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

Garland & McLean, for appellant.

Daniel Landon, for respondents.

PER CURIAM.—Appeal from an order granting a new trial. The motion was based upon the several statutory grounds. After the hearing of the motion, the court entered the following order:

“Ordered that the motion for new trial be, and the same is hereby sustained. To which plaintiff excepts.”

We have so often said—it ought not to be necessary to again repeat it—that in entering orders of this character trial courts are, by statute, vested with a peculiar discretion—a discretion vested in the trial court and not in this court—and one which, when exercised, will not be interfered with except for its manifest abuse. *Brown v. Walla Walla*, 76 Wash. 670, 136 Pac. 1166.

The evidence in this case was so conflicting as to suggest to the trial court that some one was guilty of perjury. In

¹Reported in 149 Pac. 640.

reviewing such evidence, the holding of the lower court will be accepted by us unless we can say that the evidence preponderates the other way. *Gamer v. Schlentz*, 84 Wash. 37, 146 Pac. 166. Not being able to so say, the discretion of the trial court will not be interfered with, and the judgment is affirmed.

[No. 12865. Department Two. June 25, 1915.]

THE STATE OF WASHINGTON, *on the Relation of Fred T. Neal, as Administrator etc., Plaintiff*, v. RALPH KAUFFMAN, *Judge etc., Respondent*.¹

PROHIBITION—TO COURTS—JURISDICTION—REMEDY BY APPEAL. An order of the superior court in probate, upon due application and notice, admitting a will to probate, is a final order determining the alleged jurisdictional residence of the deceased in that county, from which an appeal could have been taken; hence prohibition does not lie to prevent the court from proceeding in the matter on the ground that the court was without jurisdiction because the deceased resided at the time of his death in another county.

CERTIORARI—TIME FOR APPLICATION. An application for a writ of certiorari must be made within the time for taking an appeal.

Application filed in the supreme court May 22, 1915, for a writ of prohibition to the superior court for Kittitas county, Kauffman, J., to restrain the exercise of jurisdiction in probate. Denied.

F. K. P. Baske, for plaintiff.

Hovey & Hale, for respondent.

ELLIS, J.—This is an application for a writ of prohibition to restrain the respondent, as judge of the superior court of Kittitas county, from assuming or exercising jurisdiction over the estate of James Watson, deceased, on the ground that the deceased was not a resident of that county at the time of his death. The application recites, that the respondent has al-

¹Reported in 149 Pac. 656.

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ready assumed jurisdiction of the estate and is attempting to probate the same; that James Watson was a resident of Okanogan county at the time of his death, and owned property both in that county and in Kittitas county; that he died in Okanogan county about October 1, 1913, and that the relator was, on petition and notice, regularly appointed as administrator of the estate by the superior court of Okanogan county on May 6, 1915. The proceedings in Okanogan county are not set out, nor does it appear upon whose petition the relator was appointed. An alternative writ was issued by this court, and the matter is now here upon the application and affidavits in support thereof and the respondent's answer and return thereto.

The answer and return alleges, that James Watson died in Okanogan county, Washington, on October 16, 1913, leaving a nonintervention will of all his property, the larger part of which was located in Kittitas county; that his brother, Benjamin F. Watson, then a resident of San Francisco, California, and one James Ramsay of Ellensburg, Kittitas county, Washington, were named in the will as executors to serve without bonds; that, at the time of the testator's death, the brother was not prepared to remove to this state, and James Ramsay was temporarily absent from this state; that, on the petition of Benjamin F. Watson, one D. W. S. Ramsay, of Ellensburg, Kittitas county, Washington, after notice as required by law, and after full proof of the execution of the will by the testimony of the subscribing witnesses thereto and its admission to probate, was appointed as administrator of the estate with the will annexed, on November 11, 1913, by the superior court of Kittitas county, and on November 13, 1913, qualified as such by giving the bond in the sum of \$40,000 as fixed by that court; that, in the order, the court found and adjudged that James Watson was, at the time of his death, a resident of Kittitas county, Washington, and left an estate therein; that notice to creditors was immediately published, and the year for presenting

claims against the estate expired on November 20, 1914; that the administrator caused the estate to be appraised on December 15, 1913; that in May, 1914, both of the executors named in the will took up their residence in Kittitas county, Washington, and the administrator with the will annexed made a full report of his actions touching the estate and was discharged, and all of the property belonging to the estate was turned over to the executors named in the will; that, on November 30, 1914, the executors paid the inheritance tax due from the estate to the state of Washington, and that there is now no further occasion for probate proceedings in connection with the estate.

All of these allegations touching the probate proceedings in the superior court of Kittitas county are substantiated by a certified transcript of the proceedings from the probate records of that county, which is attached to and made a part of the respondent's return and answer. It is further alleged that an action has been commenced in the superior court of Kittitas county by an Indian woman known as Margaret Watson, with whom the testator resided from time to time before his death and who was provided for in his will, seeking to establish that she was the wife of the decedent and to have the property belonging to the estate adjudged to be community property of herself and the decedent; that the action was commenced on December 8, 1914, more than a year after the will was probated, and is now set for trial.

The statute governing the probate of estates, Rem. & Bal. Code, § 1284, provides:

"Wills shall be proved and letters testamentary or of administration shall be granted,—1. In the county of which deceased was a resident or had his place of abode at the time of his death; . . ."

The relator contends that this statute makes residence in the county jurisdictional and is mandatory, and that, upon the showing made by his petition and affidavits in support

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thereof that the decedent at the time of his death resided in Okanogan county and not in Kittitas county, a permanent writ of prohibition should issue restraining the superior court of the latter county from further proceedings in the premises.

For the purpose of this case, it may be conceded that the superior court of the county where the decedent resided at the time of his death has, under the statute, exclusive jurisdiction to administer the estate and to issue general letters thereon. This court so held on an appeal in the case of *Stern v. Sill*, 39 Wash. 557, 81 Pac. 1007, without referring to the earlier decision in *Higgins v. Nethery*, 30 Wash. 239, 70 Pac. 489, in which it was held that the residence of the decedent is not a jurisdictional fact under this same statute. But conceding the correct rule to be as stated in the later case of *Stern v. Sill*, it does not follow that prohibition is the proper remedy in this case. Where the right of a court to take jurisdiction of a given case is dependent on a given fact, the determination of that fact, like any other question of fact, is referred in the first instance to the trial court. It is a fact which that court must determine *in limine* in every case. That court of necessity has original jurisdiction to determine that fact. Its decision on that question of fact is reviewable in this court only by appeal or certiorari. In the absence of an appeal or an application for a writ of review, its decision is conclusive. *State ex rel. Baldwin v. Superior Court*, 11 Wash. 111, 39 Pac. 818; *Davison v. Davison*, 100 Mo. App. 263, 73 S. W. 373; *McDonnell v. Farrow*, 132 Ala. 227, 31 South. 475.

"To grant letters on the estate of a deceased person the probate court must find as a fact, and thus judicially determine, that the deceased had his domicile in the county or territorial district over which the jurisdiction of the court extends (or if a non-resident of the state, that he left property there), for otherwise the court would have no jurisdiction to grant letters, or take probate of a will. It was formerly held in many states, that notwithstanding this finding

and adjudication by the court, proof might be made in a collateral proceeding showing that such finding and adjudication was erroneous, and that as a matter of fact the decedent was at the time of his death domiciled in a different county; and that in such case the grant of letters was void *ab initio* for the want of jurisdiction. But the more reasonable doctrine is gaining ground, and is now held in nearly all the states, that letters so granted, while they are voidable when properly assailed, are valid until revoked in a direct proceeding." Woerner, *American Law of Administration* (2d ed.), § 204, p. 470.

This last stated rule is especially applicable in this state where, both by constitution and by statute, the superior court, a court of general jurisdiction and as part of that jurisdiction, has cognizance of all matters of probate, with power to exercise all of the inherent functions of a court of general jurisdiction in disposing of such matters. Const., art. 4, § 6; Rem. & Bal. Code, § 1278 (P. C. 409 § 1); *State ex rel. Keasal v. Superior Court*, 76 Wash. 291, 136 Pac. 147; *In re Williamson*, 75 Wash. 353, 134 Pac. 1066; *Sloan v. West*, 63 Wash. 623, 116 Pac. 272; *In re Sall*, 59 Wash. 539, 110 Pac. 32, 626, 140 Am. St. 885; *Reformed Presbyterian Church v. McMillan*, 31 Wash. 643, 72 Pac. 502; *Filley v. Murphy*, 30 Wash. 1, 70 Pac. 107. The final decision of the superior court in matters of probate, made upon statutory notice, is conclusive when unappealed from, and cannot be collaterally attacked. *In re Ostlund's Estate*, 57 Wash. 359, 106 Pac. 1116, 135 Am. St. 990; *Alaska Banking & Safe Deposit Co. v. Noyes*, 64 Wash. 672, 117 Pac. 492.

In the case before us, the order of the superior court of Kittitas county admitting the will to probate and issuing letters thereon with the will annexed, as shown by the answer and return to the alternative writ, which return is not controverted by the relator in that particular, expressly determined the jurisdictional fact of the residence of the decedent in Kittitas county upon a petition alleging that fact as required by the statute. Rem. & Bal. Code, § 1390 (P. C.

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409 § 175), and upon a hearing pursuant to notice given by the clerk of that court as required by statute, Rem. & Bal. Code, § 1392 (P. C. 409 § 179). This order was entered on November 11, 1913. It was a final order disposing of the jurisdictional question of residence and was hence an appealable order. *State ex rel. Warren v. Ayer*, 17 Wash. 127, 49 Pac. 226. In the following cases, orders cognate to that here in question have been held final and appealable under Rem. & Bal. Code, § 1716, subd. 6 (P. C. 81 § 1183), in that they finally determined substantial rights. *State ex rel. Keasal v. Superior Court, supra*; *In re Martin's Estate*, 82 Wash. 226, 144 Pac. 42. In the following cases, appeals from orders disposing finally of substantial rights in the course of administration were entertained without question. *Clancy v. McElroy*, 30 Wash. 567, 70 Pac. 1095; *In re Belt's Estate*, 29 Wash. 535, 70 Pac. 74, 92 Am. St. 916. Clearly the order of the superior court of Kittitas county determining the fact of residence of the decedent within that county at the time of his death was a final order determining a question of fact within its jurisdiction to determine, and reviewable in this court on appeal or by certiorari. It follows that prohibition will not lie. Upon the application for such a writ, we cannot try that question of fact upon affidavits, nor review the finding of the trial court. *State ex rel. Warren v. Ayer, supra*.

"The writ of prohibition will not be issued as of course, nor because it may be the most convenient remedy. Nor will it be allowed to take the place of an appeal, or perform the offices of a writ of review." *State ex rel. Lewis v. Hogg*, 22 Wash. 646, 62 Pac. 148.

See, also, to the same effect, *State ex rel. Baldwin v. Superior Court*, 11 Wash. 111, 39 Pac. 818; *State ex rel. Vincent v. Benson*, 21 Wash. 571, 58 Pac. 1066; *State ex rel. Cann v. Moore*, 23 Wash. 115, 62 Pac. 441; *State ex rel. Foster v. Superior Court*, 30 Wash. 156, 70 Pac. 230, 73 Pac. 690; *State ex rel. Stetson & Post Mill Co. v. Superior Court*,

32 Wash. 498, 73 Pac. 479; *State ex rel. Twigg v. Superior Court*, 34 Wash. 643, 76 Pac. 282; *State ex rel. Goupille v. Superior Court*, 41 Wash. 128, 82 Pac. 14; High, Extraordinary Legal Remedies, § 772.

In *State ex rel. Baldwin v. Superior Court*, *supra*, a case in which the very question here involved was presented, this court said:

"Writs of this kind are only issued to inferior courts when they are proceeding without, or in excess of, their jurisdiction. Hence, it is only necessary for us to determine as to whether or not the superior court of King county would have jurisdiction to proceed with the administration of the estate of said Lena Shay Baldwin, upon any state of facts which such court would be warranted in finding from the proofs offered or to be offered in the proceeding. If the jurisdiction depends upon a question of fact, the court in which such question is presented must be allowed to determine that fact like any other; and if it commits error in so doing, such error can be corrected on appeal. Hence it will furnish no foundation for a writ of prohibition. . . .

"If the superior court has found, or does find, as a fact, that Lena Shay Baldwin was at the time of her death a resident of Seattle, it has a right to proceed with the administration of her estate; and the remedy for such finding, if erroneous, is by appeal. Unless appealed from, such finding would become conclusive so far as the courts of this jurisdiction are concerned. In each jurisdiction the fact of residence must be decided, and such decision will be conclusive upon the courts of that jurisdiction, and will determine the status of property situated therein."

In *State ex rel. Warren v. Ayer*, *supra*, another analogous case, this court said:

"A sufficient petition therefor having been made, calling upon the court to determine the matter of its jurisdiction, and the court having granted the petition, it necessarily followed that the court determined that it had jurisdiction. If said court thereafter saw fit to again enter upon the question of jurisdiction in considering the application for the appointment of a general administrator, as it did do when the question of fact was tried, the relator's remedy, if he had

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any, was by an appeal therefrom; for it is evident that a writ of prohibition could not bring that question of fact up for determination here, it being one to be tried upon the evidence."

The case before us presents even stronger reasons for refusal of the writ than those found in either of these cases. The probate of the estate was assumed by the superior court of Kittitas county upon an order finding every jurisdictional fact. The administration has now proceeded in all respects regularly for almost fifteen months. Notice as required by law, as shown by the transcript of the proceedings, has been given of every step. There is no allegation or claim that any person in any manner interested, or claiming an interest in the estate, has not had actual knowledge of the proceedings from the beginning. These, at whose instance relator has been appointed as administrator by the superior court of Okanogan county, have mistaken their remedy. They should have appeared and objected to the jurisdiction of the superior court of Kittitas county in the first instance, making the showing in that court which, so far as indicated by anything before us, they are now seeking to make for the first time in this court. They would then have been in a position to appeal, or if they believed an appeal inadequate, to apply to this court for a writ of review. *Stern v. Sill, supra*. Failing this course, they might have moved in the original proceedings in the superior court of Kittitas county at any time within a year from the entry of the order of probate, to set it aside, and in case of a refusal might have appealed from or applied for a writ of review of the order of denial. *State ex rel. Baldwin v. Superior Court, supra*.

Though in a proper case, and where the showing brings up the entire record and evidence upon which a trial court has acted, we will treat an application for prohibition as one for a writ of review, we could not do so in this case even if the evidence upon which the superior court of Kittitas county acted were before us. The time for taking an appeal from a

final order affecting a substantial right in a civil proceeding is ninety days (Rem. & Bal. Code, § 1718 [P. C. 81 § 1187]), and if for any reason an appeal would be inadequate, certiorari will lie, but the application for the writ must be made within the time for taking an appeal. *State ex rel. Keasal v. Superior Court, supra.*

The temporary writ must be quashed and the permanent writ denied. It is so ordered.

MORRIS, C. J., MAIN, FULLERTON, and CROW, JJ., concur.

[No. 12339. Department Two. June 26, 1915.]

UNITED STATES RUBBER COMPANY OF CALIFORNIA, *Appellant*,
v. AMERICAN BONDING COMPANY OF BALTIMORE,
Respondent, WASHINGTON ENGINEERING
COMPANY, *Defendant*.¹

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—BONDS—CONDITIONS—"SUPPLIES." A bond given by a contractor to secure payment of materials furnished, and of all persons who shall supply the contractor with provisions and "supplies" for the carrying on of the work, in compliance with Rem. & Bal. Code, § 1159, does not cover a sum due for rubber goods, consisting of hose, washers, couplings, belts, tubing, gloves, boots, and overcoats which were entirely worn out in the construction of a steel bridge; since the goods were in the nature of "equipment" and neither "materials" nor "supplies" within the meaning of the act.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered April 29, 1914, upon sustaining a demurrer to the complaint, dismissing an action upon an indemnity bond. Affirmed.

Bronson & Robinson and *H. B. Jones*, for appellant.

Hayden, Langhorne & Metzger, for respondent.

¹Reported in 149 Pac. 706.

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Opinion Per FULLERTON, J.

FULLERTON, J.—In July, 1911, the city of Tacoma entered into a contract with the Washington Engineering Company, by the terms of which the engineering company undertook to erect for the use of the public a vertical lift steel bridge across the Puyallup river. As required by § 1159 of Rem. & Bal. Code (P. C. 309 § 98), the city took from the contractor a bond, with the American Bonding Company of Baltimore, as surety, conditioned that the contractor should “pay all laborers, mechanics and subcontractors and materialmen, and all persons who shall supply such person or persons, or subcontractors, with provisions or supplies for the carrying on of such work.”

During the progress of the work, the United States Rubber Company furnished the contractor with certain rubber goods, consisting of hose, washers, couplings, spanners, belts, tubing, packing, gloves, boots, overcoats, and perhaps goods of other descriptions, the whole having a value of \$1,094.80. The contract was of considerable magnitude, requiring some time for its completion, and the goods so furnished were entirely worn out by use during the progress of the work. The goods were not paid for by the contractor, and the rubber company filed with the proper authorities of the city of Tacoma a notice of its claim of lien against the bond for the value of the goods. The claim was disputed by the surety, and the present action was begun by the vendor of the goods against the contractor and surety to recover thereon. To a complaint embodying the foregoing facts, a demurrer was interposed by the surety, which the trial court sustained. This is an appeal from a judgment of dismissal entered after the plaintiff had refused to plead further.

The sole question before us therefore is, do the articles described fall within the description of articles secured by the conditions of the bond; or, in other words, are they materials, provisions or supplies, within the meaning of either of these terms as used in the statute. Seemingly, on first impression, the statute is broad enough to include anything that might be

furnished the contractor useful or necessary in carrying on the contractual work, but the courts do not generally so hold. It is generally held, and we have heretofore held, that the security of the bond does not cover the cost of the contractor's working equipment; as the "contract presupposes that the contractor has and will furnish upon his own account the necessary tools, implements and appliances with which to perform the work." *Standard Boiler Works v. National Surety Co.*, 71 Wash. 28, 127 Pac. 573, 43 L. R. A. (N. S.) 162. To determine, then, whether a given article furnished the contractor is or is not within the terms of the bond, it is necessary to distinguish between materials, provisions and supplies on the one side, and the contractor's working equipment on the other.

To distinguish between materials and equipment is comparatively easy, since the term materials, as we have defined the term in *Gate City Lumber Co. v. Montesano*, 60 Wash. 586, 111 Pac. 799, includes such articles only as enter into and form a part of the finished structure, or, it may be, such articles as are capable of being so used and are furnished for that purpose, while equipment is, what the word imports, the outfit necessary to enable the contractor to perform the agreed service; the tools, implements and appliances which might have been previously used or might be subsequently used by the contractor in carrying on other work of like character. *Standard Boiler Works v. National Surety Co.*, *supra*.

To distinguish between provisions and equipment, also, has not caused much difficulty, since the courts have usually given the word provisions its ordinary meaning. But in distinguishing between supplies and equipment, the courts have not been so fortunate, and seemingly the cases, including our own, are not entirely consistent. In harmony with the definition of the term equipment heretofore given, we held in *Standard Boiler Works v. National Surety Co.*, *supra*, that the cost of repairs made to a steam shovel, hired by a contractor and used by him in performing the contractual work, was not re-

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coverable against the bondsmen as a supply, but held, on the contrary, that the steam shovel was a part of the contractor's equipment, and that an indebtedness incurred for labor thereon in the nature of repairs was not different from an indebtedness incurred in the purchase of the machine, or for labor in its original construction; and in *City Retail Lumber Co. v. Title Guaranty & Surety Co.*, 72 Wash. 300, 130 Pac. 345, we held that an indebtedness for ties furnished a contractor and used by him for laying a temporary railway track for use in carrying on a street grading contract was not recoverable as an indebtedness for supplies furnished the contractor. Illustrative of the other side of the proposition, we held in *National Surety Co. v. Bratnaber Lumber Co.*, 67 Wash. 601, 122 Pac. 337, that coal furnished a contractor for use as fuel in the operation of a steam shovel on a public work was a supply within the meaning of that term as used in the statute. In this case a supply was defined as being any article entirely consumed by its use in the work, and the definition has been repeated in other cases. It seemed to us, however, on further consideration, that the definition is not strictly accurate. Aside from the fact that it conflicts with the definition given to the word equipment in the case of *Standard Boiler Works v. National Surety Co.*, heretofore noticed, it is in itself hardly consistent, if by the term "consumed" is meant "entirely worn out or destroyed by use," as it would make the question of liability under the bond turn on the degree of use made of the article rather than on the nature of the article itself. To illustrate: under this definition, picks, shovels, scrapers and like articles furnished a person having a contract to construct or repair a public highway would be supplies when entirely consumed by use in the prosecution of the work, and equipment when only ninety-nine or some less per cent consumed. Such a distinction could hardly have been within the intent of the legislature, and we think it was meant to make the distinction rest on the effect the use has upon the article, rather than upon the de-

gree of use to which it is subjected. So construing the statute, the definitions of equipment and supply coincide, and a certain and natural dividing line is found between them. A supply would be any article furnished for carrying on the work which from its nature is necessarily consumed by use in the work, while equipment would consist of those articles that are not necessarily so consumed, but which may survive the particular work and be further used on work of like character. In this view, also, the question actually decided in the case of *National Surety Co. v. Bratnober Lumber Co.* harmonizes with the other cases cited, since coal, like powder and other explosives, and like electricity used for power, and other forms of energy used for the same purpose, is necessarily consumed by its use, and cannot survive for like uses in a similar character of work.

Tested by these rules, it is plain that the articles furnished by the appellant are not supplies, but are a part of the contractor's equipment. While they were actually worn out by use in carrying on the work, they were not articles of such a nature as to be necessarily consumed by such use, and might have survived, had their use therein been of less duration, for use in subsequent work of like character.

But the appellant cites, as supporting its contention, the case of *Hurley-Mason Co. v. American Bonding Co.*, 79 Wash. 564, 140 Pac. 575, to which may be added the more recent case of *National Lumber & Box Co. v. Title Guaranty & Surety Co.*, 85 Wash. 660, 149 Pac. 16, which hold that the rental value of machinery hired by the contractor for use in carrying on work within the terms of the contract is recoverable from the bondsman as a supply furnished the contractor. These cases proceed on the theory that it was the use of the machinery that was consumed in the work, not the machinery itself, and that this use, being distinguishable from the machinery, could be recovered for against the bondsman as a supply. If this distinction is sound, then the cases are in line with the other cases cited, as such "use"

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Statement of Case.

was necessarily consumed in carrying on the work. The appellant argues, however, that the distinction is not sound; that there is no just ground for holding that one who rents to a contractor the tools and working appliances necessary for the prosecution of a particular work may have recovery against the contractor's bondsmen for the rental value of the articles furnished, while one who sells the contractor the same character of articles on credit has no claim against the bondsmen for any part of the purchase price. But, if this be true, and it be true that the contractor's working equipment is not to be deemed a supply, it argues that the decisions cited are erroneous, rather than that the appellant's goods fall within the meaning of the term supplies.

Our conclusion is that the judgment must stand affirmed.

MORRIS, C. J., ELLIS, MAIN, and CROW, JJ., concur.

[No. 12350. Department Two. June 26, 1915.]

A. B. OLSEN, *Respondent*, v. B. F. NICHOLS, *Appellant*.¹

EVIDENCE—PAROL EVIDENCE—TO VARY WRITING. Where a written contract for the exchange of properties provided that the plaintiff might elect to take cash instead of a mortgage for the balance due him, it is inadmissible to show a further oral agreement that in case of such election, plaintiff was to execute a deed of his property to enable the defendant to borrow money thereon to make the cash payment; since the same adds a provision to the contract covering a subject-matter mentioned therein.

Appeal from a judgment of the superior court for Spokane county, Sessions, J., entered May 20, 1914, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Reversed.

John Pattison, for appellant.

A. E. Barnes, for respondent.

¹Reported in 149 Pac. 668.

MAIN, J.—The purpose of this action was to recover damages claimed to be due on account of the breach of a contract to convey real estate. The cause was tried to the court sitting without a jury. A judgment was entered in favor of the plaintiff. The defendant appeals.

On the 4th day of June, 1912, and for some time prior thereto, the respondent was the owner of a farm consisting of approximately 2,000 acres, situated in Walla Walla county, state of Washington. The appellant, B. F. Nichols, was the owner of certain lots in the city of Spokane, upon which had been erected an apartment house. On the date mentioned, the appellant and the respondent entered into a written contract for the exchange of properties. This contract provided that the,

“Party of the first part [Nichols] to assume a mortgage of twenty thousand dollars at seven per cent, due four years from April 1, 1912, and the party of the second part [Olsen] to give a mortgage back to the party of the first part on the said brick building for the sum of eighteen thousand dollars at seven per cent, due on or before April 1, 1916, or eighteen thousand dollars cash, if preferred by party of the first part, and for the true and faithful performance of all and several of the covenants and agreements herein mentioned, the parties hereto are held and firmly bound unto each other in the sum of two thousand dollars in gold coin of the United States as fixed, settled and liquidated damages to be paid by the party failing to keep all and several his covenants and agreements to other parties hereto.”

Some time after the execution of this contract, the appellant gave notice that he elected to take cash instead of a mortgage back for \$18,000, as specified in the contract. Thereafter the respondent executed a deed to the farm lands and delivered the same to Houchins & Company, real estate brokers in the city of Spokane, through whom the negotiations leading up to the contract had been conducted. The \$18,000 at no time was tendered to the appellant.

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Upon the trial, evidence was offered and admitted, over the objection of the appellant, to the effect that, at the time the contract was executed and during the negotiations leading up thereto, it was the understanding of the parties that, if the appellant elected to take cash, a deed to the apartment house property was to be delivered to the respondent in order that he might negotiate a loan for the \$18,000 in cash mentioned. The appellant refused to execute and deliver his deed prior to the making of the cash payment. The transaction was at no time consummated. The present action, as already indicated, was for the purpose of recovering the \$2,000 mentioned therein as damages on account of either party failing to keep his covenants.

The controlling question is whether the respondent had a right to show by oral testimony that the understanding between the parties was that, if the appellant elected to take cash, he would then deliver his deed investing the respondent with title to the apartment house, in order that the latter might negotiate a loan to make the cash payment. The rule is that parol evidence is not admissible for the purpose of adding to, modifying, or contradicting the terms of a written contract in the absence of fraud, accident or mistake. *Staver & Walker v. Rogers*, 3 Wash. 603, 28 Pac. 906; *Jordan v. Coulter*, 30 Wash. 116, 70 Pac. 257; *Ross v. Portland Coffee & Spice Co.*, 30 Wash. 647, 71 Pac. 184; *Minnesota Sandstone Co. v. Clark*, 35 Wash. 466, 77 Pac. 803.

Many other authorities might be cited in support of the rule. In fact, the general rule is not denied by the respondent. But he claims that the testimony was admissible under the rule which provides that parol evidence is admissible to show the situation of the parties and the circumstances under which the instrument was executed. That parol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed, for the purpose of ascertaining the intention of the parties and properly construing the writing, is well settled. Such

evidence, however, is admitted, not for the purpose of importing into a writing an intention not expressed therein, but with the view of elucidating the meaning of the words employed. Evidence of this character is admitted for the purpose of aiding in the interpretation of what is in the instrument, and not for the purpose of showing intention independent of the instrument; it being the duty of the court to declare the meaning of what is written, and not what was intended to be written. 17 Cyc. 607; 9 Ency. Evidence 374; *Merriam v. United States*, 107 U. S. 437. If the evidence offered went no further than to show the situation of the parties and the circumstances under which the instrument was executed, then it was admissible. But if it went to the extent of adding to, modifying, varying or contradicting the terms of the writing, then it was obviously inadmissible.

The written contract provided that the appellant, if he preferred to do so, might elect to take cash instead of a mortgage back for the sum of \$18,000. This election, as shown by the facts stated, was made. The contract contains no provision that if the appellant should elect to take cash, he would then deliver his deed in order that the respondent might borrow the money upon the property with which to make the cash payment. It seems to us that the oral testimony added a provision to the contract covering the subject-matter mentioned therein. In other words, the contract was that, if the appellant elected to take cash, then he would invest the respondent with title to the apartment house, in order that the latter might negotiate the necessary loan.

The respondent, in his brief, states that the appellant knew "that the respondent could not borrow the money unless he had been invested with the title of the rooming house." But the written contract does not contain a provision making it the duty of the appellant to so invest the respondent with title. The evidence admitted did not fall within the rule relative to showing the situation of the parties and the surrounding circumstances. That evidence, as already shown,

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is received, not for the purpose of showing any intention of the parties aside from the contract, but for the purpose of aiding in the interpretation of what is in the contract itself. The contract under consideration here is silent as to how or in what manner the respondent was to raise the \$18,000 in cash. We think the evidence was inadmissible under either of the rules stated.

The respondent claims that the evidence was admissible under the rules stated in the cases of *Potlatch Lumber Co. v. North Coast Produce Co.*, 78 Wash. 533, 139 Pac. 496, and *Wolff v. Love*, 78 Wash. 561, 139 Pac. 597. In the *Potlatch Lumber Co.* case, the evidence there offered related to a subject-matter not covered by the written contract. In the present case, the evidence admitted related to a subject-matter mentioned in the contract. In the *Wolff* case, the rule that the consideration for a contract may be inquired into, and even contradicted by parol testimony, was applied to the facts in that case. In the case now under consideration, the question involved is not that of showing the real consideration for the contract.

The judgment will be reversed, and the cause remanded with direction to dismiss the action.

MORRIS, C. J., ELLIS, FULLERTON, and CROW, JJ., concur.

[No. 12581. Department One. June 26, 1915.]

**EHRlich-HARRISON COMPANY, *Appellant*, v. E. E. CUSHMAN
et al., *Respondents*.¹**

APPEAL—DECISIONS REVIEWABLE—CESSATION OF CONTROVERSY—PAYMENT OF COSTS. Upon appeal by a nonresident plaintiff from a judgment of dismissal, with costs to defendant, the deposit in court of sufficient money to cover the costs, for the sole purpose of protecting the plaintiff's sureties upon a nonresident bond that he had been compelled to furnish, is not a voluntary payment working a cessation or waiver of the appeal.

MECHANICS' LIENS—MATERIALS—NOTICE TO OWNER—SUFFICIENCY—STATUTES. 3 Rem. & Bal. Code, § 1133, providing that materialmen shall serve notice upon the owner stating "in substance and effect . . . that a lien may be claimed" for materials furnished to the contractor, is sufficiently complied with by a notice of the furnishing of materials, reciting: "Complying with the lien laws of the state of Washington"; 2 Id., § 1147, requiring a liberal construction of the lien laws.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered April 23, 1914, dismissing an action to foreclose a materialman's lien, tried to the court. Reversed.

W. W. Keyes, for appellant.

Boyle, Brockway & Boyle, Blackburn & Gielens, and *Williamson, Williamson & Freeman*, for respondents.

MOUNT, J.—This action was brought to foreclose a materialman's lien for materials furnished in the construction of a dwelling house for the defendants Cushman and wife. The case was tried to the court. At the conclusion thereof, the court was of the opinion that the notice given to the defendants Cushman and wife was insufficient, and for that reason dismissed the action. The plaintiff has appealed.

Respondents move to dismiss the appeal for the reason that the judgment appealed from has been voluntarily paid

¹Reported in 149 Pac. 708.

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by the appellant. It appears that the plaintiff is a non-resident of Pierce county, where the action was instituted. The defendants filed a motion requiring the plaintiff to give a nonresident cost bond. The plaintiff complied with this motion and filed a bond for costs. After the judgment of dismissal, the plaintiff, in order to protect the sureties upon the cost bond, deposited with the clerk of the court sufficient money to cover the judgment for costs. Thereafter the defendants withdrew this money from the clerk, and now contend that the payment of this money to the clerk was a voluntary payment of the judgment. We think there is no merit in this contention, because it appears that the sole object of depositing this money was to protect the sureties upon the cost bond from harassment upon an execution. The appellant was not required to supersede the judgment, and did not intend to satisfy the judgment pending the appeal. Nor did it intend to waive its right of appeal, which was being timely prosecuted. The motion to dismiss is therefore denied.

It appears that the respondents Cushman and wife let a contract to the respondent C. H. Hallen to construct a dwelling house in the city of Tacoma. Thereafter Hallen sublet a portion of the work to the respondents Linck & Larson, who ordered certain material from the appellant to be used, and which was used, in the construction of the dwelling. At the time of the first order by Linck & Larson for materials from the appellant, the appellant sent a statement or notice to Mr. Cushman, as follows:

"Ehrlich-Harrison Co., Dealers in Hardwood Lumber, Maple and Oak Flooring. Cor. R. R. Avenue and Connecticut Street. Seattle, Wash., Jan. 16, 1913.

"Sold to Linck & Larson, So. 30 & Prospect St., Tacoma, Wn.—For Judge E. E. Cushman—Residence."

Then follows an itemized statement of the material furnished and the prices. Continuing, the notice says: "Complying with the lien laws of the state of Washington." It is

conceded that this notice was received by Mr. Cushman. A copy thereof was also mailed to Linck & Larson. Thereafter, and within the required time, the appellant filed a lien upon the building, and this action was afterward brought to foreclose the lien.

The statute, 3 Rem. & Bal. Code, § 1133, provides:

"Every person, firm or corporation furnishing materials or supplies to be used in the construction, alteration or repair of any . . . building . . . shall, not later than five (5) days after the date of the first delivery of such materials or supplies to any contractor or agent, deliver or mail to the owner or the reputed owner of the property on, upon, or about which such materials or supplies are to be used, a notice in writing, stating in substance and effect that such person, firm or corporation has commenced to deliver materials and supplies for use thereon, with the name of the contractor or agent ordering the same, and that a lien may be claimed for all materials and supplies furnished by such person, firm or corporation for use thereon; and no further notice to the owner shall be necessary. No material-men's lien shall be enforced unless the provisions of this act have been complied with."

The trial court was of the opinion that the above stated notice did not inform the respondent Cushman that the appellant intended to file a lien upon the property. It cannot be reasonably concluded that any other intention can be obtained from the notice. The sole object of the words in the notice, "Complying with the lien laws of the state of Washington," was to indicate that the notice was given for the purpose of showing that the material had been furnished to the agent of the owner, with the idea that if the bill was not paid, a lien would be filed under the laws of the state. Any person receiving such a notice would immediately conclude that the notice was given for the purpose of complying with the statute. The statute does not require a particular form, but says: "A notice in writing, *stating in substance and effect* that such person, firm or corporation has commenced to deliver materials and supplies," and that a lien

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may be claimed therefor. Rem. & Bal. Code, § 1147 provides:

"The provisions of law relating to liens created by this chapter, and all proceedings thereunder, shall be liberally construed with a view to effect their objects."

See, also, *Cornelius v. Washington Steam Laundry*, 52 Wash. 272, 100 Pac. 727; *Hillyard Lumber Co. v. Codd*, 85 Wash. 612, 149 Pac. 30.

It is apparent that this notice was sufficient to place the owner of the building upon notice, which is the object of the statute. It is no doubt true that ordinarily the provisions for statutory liens must be strictly followed. But where the statute does not prescribe a form, and where it provides that a notice stating in substance and effect that a lien may be claimed when a notice is given which would inform an ordinarily prudent man what the claimant intended to do, is sufficient. We are satisfied, therefore, that the trial court erred in holding that this notice was not sufficient.

It is argued by the respondents that the appellant did not prove that the material was furnished for use in a dwelling situated upon the property on which the foreclosure is sought. The trial court was evidently of the opinion that there was sufficient proof of this fact, and we are satisfied that the court was right in that respect.

The respondents Cushman also contend that, since this is a trial here *de novo*, the judgment, if reversed, should be so worded as to protect their rights against the contractor Hallen. It is apparent from the record here that a judgment should be entered by the trial court as prayed for in the complaint in favor of the appellant. No such judgment has yet been entered. It is not necessary in this opinion to direct the particulars of the judgment. That may be safely left to the trial court. If the respondent Hallen is liable to the Cushmans for the amount of the judgment upon this foreclosure, the trial court will no doubt enter such a decree.

For the reasons hereinbefore stated, the judgment is reversed, and the cause remanded for a judgment in favor of the appellant.

MORRIS, C. J., CHADWICK, HOLCOMB, and PARKER, JJ.,
concur.

[No. 12584½. Department One. June 26, 1915.]

KATHERINE FIELDING, *Respondent*, v. H. L. KETLER *et al.*,
Appellants.¹

HUSBAND AND WIFE—COMMUNITY PROPERTY—LOAN TO WIFE. The loan of money to a wife to purchase a hotel business, while living with her husband, although he was away much of the time and she ran the hotel, constitutes a community debt.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered September 15, 1914, upon findings in favor of the plaintiff, in an action for money loaned, tried to the court. Affirmed.

J. W. Selden, for appellants.

Gilbert E. Peterson, for respondent.

HOLCOMB, J.—Numerous assignments of error are made by appellants on this appeal, but the only question argued is whether or not the debt is a community debt and should stand as a lien against the community property of appellants. The trial court so found and concluded, and rendered judgment accordingly.

Katherine Fielding is the mother of appellant Martha Ketler. Appellants had been married some thirty-one or thirty-two years prior to the original transaction involved in this

¹Reported in 149 Pac. 667.

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action, and were living together as husband and wife at the time and since. On October 7, 1911, Martha Ketler obtained from respondent three hundred dollars, which she claimed and testified was an advancement or gift to her. Respondent testified it was a loan, produced a letter from her daughter admitting it was a loan, the court so found, and the evidence fully justifies the finding. Appellants claimed, however, that the money was used by the wife as part purchase price of a hotel business, not the real estate, which she bought and managed as her own sole and separate property, and with which the husband had nothing to do.

The legal presumption is, of course, that the money being borrowed, it became a community liability. Our statutes define separate property as that acquired by either spouse, (1) before marriage, or (2) by gift, devise or inheritance, and the rents, issues and profits of property so acquired. Rem. & Bal. Code, §§ 5915, 5916 (P. C. 95 §§ 25, 9). Exceptions are also made in favor of the wife as to her earnings by personal labor, and as to the earnings and accumulations of herself and minor children living with her, or in her custody, while she is living separate and apart from her husband, by the provisions of Rem. & Bal. Code, §§ 5920 and 5921 (P. C. 95 §§ 17, 35). The hotel was occupied by the appellants together, though the husband was away much of the time at other work he had, and the wife ran the hotel.

In this case, appellants in reality sought to establish that the money was acquired by the wife as a gift from the mother, so as to come under the provisions of § 5916, *supra*, and failed. It was established as a loan to the wife, during the existence of the status and relations of the community. In such case, it is a community obligation. Rem. & Bal. Code, § 5917 (P. C. 95 § 27); *Yesler v. Hochstetler*, 4 Wash. 349, 30 Pac. 398; *Abbott v. Wetherby*, 6 Wash. 507, 33 Pac. 1070, 36 Am. St. 176; *Main v. Scholl*, 20 Wash. 201, 54 Pac. 1125; *Heintz v. Brown*, 46 Wash. 387, 90 Pac. 211, 123 Am. St. 937; *Graves v. Graves*, 48 Wash. 664, 94 Pac. 481.

The judgment entered was correct in giving judgment against Martha Ketler personally, and against the community consisting of herself and husband.

Affirmed.

MORRIS, C. J., MOUNT, CHADWICK, and PARKER, JJ., concur.

[No. 12812. Department Two. June 26, 1915.]

THE STATE OF WASHINGTON, *on the Relation of Lucy Nicholson, Plaintiff*, v. THE SUPERIOR COURT FOR SPOKANE COUNTY, *Respondent*.¹

APPEAL—DECISION—REVERSAL AND REMAND—SCOPE OF DECISION. Upon an appeal in probate proceedings, where the sole question presented was whether the evidence was sufficient to establish a partnership as to the estate under administration, and the case was remanded with directions to enter a decree in favor of the appellant establishing her one-half interest in the estate, the trial court has no power to go further or to enter a judgment requiring a conveyance of one-half of the partnership property and a money judgment for the proceeds of other property; no accounting having been had or debts or claims against the estate established.

Application filed in the supreme court April 24, 1915, for a writ of mandamus to compel the superior court for Spokane county, Kennan, J., to sign a judgment in favor of relator. Denied.

Voorhees & Canfield and *C. E. H. Maloy*, for relator.

Peacock & Ludden, for respondent.

MAIN, J.—This is an original application to this court for a writ of mandamus. On or about December 16, 1912, the relator here brought an action against one T. T. Kilbury, as the administrator of the estate of Emma J. Kilbury, deceased. The purpose of this action was to establish the fact that a partnership relation existed between the plaintiff

¹Reported in 149 Pac. 666.

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and Emma J. Kilbury, deceased, during the latter's lifetime, and for an accounting. After the issues were framed, the cause in due time came on for trial before the court sitting without a jury. At the conclusion of the trial, the judge of the superior court before whom the cause was tried, being of the opinion that the evidence failed to establish a partnership relation, dismissed the action. Thereafter an appeal was prosecuted to this court by the plaintiff, and the judgment of the trial court was reversed, this court being of the opinion that the evidence established the existence of the partnership relation. *Nicholson v. Kilbury*, 83 Wash. 196, 145 Pac. 189.

After the remittitur had been filed in the office of the clerk of the superior court, the plaintiff presented to the trial judge a form of judgment. By this proposed judgment, the partnership relation was established, the property was described, the administrator of the estate of Emma J. Kilbury, deceased, was required to convey an undivided one-half interest in the property to the plaintiff, and also provided that the administrator should pay to the plaintiff the sum of \$3,900. This sum is claimed to be one-half of the net proceeds from a sale by the administrator of certain of the property of the partnership. The trial court declined to sign the judgment in the form indicated. The court was willing to sign a judgment adjudicating the fact of the partnership relation, and describing the property, but was unwilling to sign a judgment which required the administrator to convey to the plaintiff one-half of the partnership estate and render a money judgment against the administrator for the sum mentioned. The present application was made for the purpose of requiring the trial judge to sign the judgment in the form presented.

The question here presented is whether the plaintiff had a right to a judgment directing the conveyance of one-half of the partnership estate and providing for a money judgment against the administrator for the sum of \$3,900. When the

cause was here upon appeal, as shown by the opinion in the case, "the sole question presented by this appeal is whether the evidence was sufficient to establish the alleged partnership." After finding that the evidence was sufficient to establish the partnership relation, the cause was "remanded with direction to enter a decree in favor of the appellant establishing her undivided one-half interest in the entire estate," except the proceeds of what is known as the Markel notes, about which there was no contention. We think the judgment which the trial court was willing to sign was as broad as the direction given by this court in reversing the case. The estate of Emma J. Kilbury, deceased, was in process of administration. To enter a judgment requiring the conveyance of one-half of the partnership property, and a money judgment for the proceeds of the other property, would be to determine in this action questions which properly would be determined in the administration proceeding. Neither the trial court nor this court made any accounting between the parties. What the debts or claims against the partnership estate amounted to does not appear.

The writ will be denied.

MORRIS, C. J., ELLIS, FULLERTON, and CROW, JJ., concur.

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Opinion Per MAIN, J.

[No. 12508. Department Two. June 30, 1915.]

THE STATE OF WASHINGTON, *on the Relation of R. A. Lathrop, as Prosecuting Attorney for Mason County, Plaintiff, v. JACOB HAUPTLY, as Justice of the Peace of No. 2 Shelton Precinct, Respondent.*¹

CONSTITUTIONAL LAW—CLASS LEGISLATION—VENUE—CHANGE—BIAS OF JUSTICE. Rem. & Bal. Code, §1774, providing that defendant, upon filing an affidavit of prejudice before the justice of the peace before whom the action was instituted, has the right to a change of venue to the next nearest justice, is not unconstitutional as class legislation in that the state in a criminal action as the other party thereto, is not given the same right.

Appeal from a judgment of the superior court for Mason county, Mitchell, J., entered October 16, 1914, dismissing an application for a writ of review, upon sustaining a demurrer to the petition. Affirmed.

R. A. Lathrop, for appellant.

D. F. Wright, for respondent.

MAIN, J.—On April 21, 1914, the prosecuting attorney for Mason county filed a complaint before F. J. Emery, a justice of the peace for Shelton precinct No. 1, charging one Karl Rose with the crime of assault. On April 22, 1914, the defendant was arraigned, and entered a plea of not guilty. The cause was set for trial on the 25th day of that month. On the latter day, and previous to the commencement of the trial, the defendant moved for a change of venue, and supported his motion by an affidavit of prejudice. The cause was thereupon, by the justice of the peace for precinct No. 1, transferred to Jacob Hauptly, justice of the peace for Shelton precinct No. 2, he being the next nearest justice of the peace within the county. The latter justice set the case for trial on April 25, at 1 o'clock p. m. At the time set

¹Reported in 149 Pac. 705.

for the trial, the prosecuting attorney appeared and requested that the case be returned to the justice of the peace for precinct No. 1, and supported a motion for a change of venue by an affidavit of prejudice. The justice of the peace for precinct No. 2 declined to transfer the case. Thereupon the prosecuting attorney refused to proceed further, and a judgment was entered dismissing the action. On April 28, 1914, the prosecuting attorney filed in the superior court an application for a writ of review, claiming that the justice of the peace for precinct No. 2 had acted without jurisdiction in the matter. On May 4, 1914, the superior court issued the writ as prayed for. Thereafter and on May 20, the respondent demurred to the petition for the writ of review. On October 16, 1914, this demurrer was sustained. The relator elected to stand upon his petition, and the cause was by the court dismissed. From the judgment of dismissal, the relator appeals.

The sole contention upon this appeal is that Rem. & Bal. Code, § 1774 (P. C. 287 § 471), which gives the defendant, upon the filing of an affidavit that he believes that he cannot have a fair trial before the justice of the peace before whom the action was instituted, the right to have the case transferred to the next nearest justice of the peace in the same county, is unconstitutional. The basis of this contention is that the right of transfer is not equally extended to both parties to the litigation, and, therefore, offends against § 12 of art. 1 of the state constitution, which provides that no law shall be passed granting to any citizen or class of citizens, other than municipal corporations, privileges or immunities which upon the same terms shall not equally belong to all citizens. We think a sufficient answer to the appellant's contention is found in the fact that the state was a party plaintiff to the action which was transferred from one justice of the peace to the other. The state speaks through its legislature. The legislature having provided that the defendant was entitled to a change of venue without extending the same

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right to the plaintiff, the state is not in a position to complain when it is a party to the action against which the right given by the statute is invoked. Speaking upon this question, the supreme court of the state of California, in *People ex rel. Smith v. Judge of the Twelfth District*, 17 Cal. 548, said:

“But another ground might be taken, even if this general view is erroneous. The state is the party prosecuting upon the record. The state is represented by the legislature, not only in respect to its prosecutions, but its general business, property, and litigation. It can order prosecutions, suits and informations, and it can release, discharge and discontinue them. By the act and orders of the legislature, the district attorneys appear to prosecute and are paid. These attorneys are but subordinate representatives of the state, but they are controlled by and are responsible to the legislature, who are the primary and original representatives of the sovereign power. No one doubts that the district attorney could by stipulation consent to this change of venue, why not the legislature—in this respect the superior of the district attorney? The state by her legislature can repeal the law which creates the crime; can it not consent to a place of trial different from that in which the indictment is found? The defendant consents, he does not complain. Why may not, then, the highest authority in the state agree with him to this order?”

The judgment will be affirmed.

MORRIS, C. J., ELLIS, FULLERTON, and CROW, JJ., concur.

[No. 11851. *En Banc*. June 30, 1915.]

I. H. JENNINGS, as *Trustee in Bankruptcy, etc., Appellant*,
v. FRANK SCHWARTZ, *Sole Trader as Alaska Junk*
Company, Respondent.¹

SALES—CONDITIONAL SALES—RECORDING—"SIGNED" BY VENDOR—VALIDITY—SUBSEQUENT CREDITORS—SPECIFIC LIEN—NECESSITY. Although a conditional sales contract was not "signed" by the vendor, within the meaning of Rem. & Bal. Code, § 3670, providing that certain conditional sales of personal property shall be absolute as to subsequent creditors, etc., unless within ten days after taking possession by the vendee, a memorandum of the sale signed by the vendor and vendee, be filed in the auditor's office, it is valid as between the parties, and where the vendor retook possession for default, before any creditor acquired a specific lien on the property and before the appointment of a trustee in bankruptcy, the rights of the vendee were terminated and the trustee acquired no title to the property (overruling on rehearing *Id.*, 82 Wash. 209).

FULLERTON and CHADWICK, JJ., dissent.

Appeal from a judgment of the superior court for King county, Humphries, J., entered November 20, 1913, upon findings in favor of the defendant, in an action for conversion, tried to the court. Affirmed.

Nelson R. Anderson and *France & Helsell*, for appellant.

Wright, Kelleher & Caldwell, for respondent.

ON REHEARING.

MOUNT, J.—After the original opinion was filed in this case, a rehearing was granted and a reargument was had to the whole court sitting *En Banc*. The original opinion will be found in 82 Wash. 209, 144 Pac. 39. The facts therein stated are substantially correct. The record shows that the vendor of the boiler in question retook possession of the boiler in December, 1912, instead of February, 1913, as therein stated. Upon this question, the trial court found:

¹Reported in 149 Pac. 947.

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"That after the said default in payment and said election by the vendor to terminate said contract and prior to the filing of petition in bankruptcy of the said Pacific Coast Glass Company, a corporation, and prior to the election of the plaintiff herein as trustee of the said bankrupt estate, and prior to the said trustee taking possession of any of the property of the said Pacific Coast Glass Company, the defendant herein, in compliance with the terms of said conditional sale contract took possession of said boiler and has been since said date and now is in possession thereof."

In the former opinion, we rested our decision solely upon the point that the conditional bill of sale mentioned was void because it was not signed by the vendor, as the statute provides. We are now satisfied that it was not necessary to pass upon the validity of the conditional sale contract as affected by creditors of the vendee, because the conditional sale was rescinded and possession of the property was retaken by the vendor before any right or lien of creditors attached. The validity of the sale, therefore, as between the original parties to it, must control the decision. As noted above, the property was sold to the Pacific Coast Glass Company upon conditional sale in August, 1912. Thereafter, in December, 1912, on account of default in payment, the vendor retook possession of the property before the Pacific Coast Glass Company was declared bankrupt, and before a receiver or trustee in bankruptcy was elected. This court has many times held that, where contracts of this kind are void as between the vendor and creditors of the vendee, yet, as between the vendor and the vendee, such contracts are valid. *Watson v. First National Bank of Clarkston*, 82 Wash. 65, 143 Pac. 451; *Secor v. Close*, 83 Wash. 77, 145 Pac. 56; *Malmo v. Washington Rendering & Fertilizing Co.*, 79 Wash. 534, 140 Pac. 569; *Heal v. Evans Creek Coal & Coke Co.*, 71 Wash. 225, 128 Pac. 211.

In the *Malmo* case, in discussing the difference between a chattel mortgage and a conditional sale contract, we said:

"The one instrument evidences a lien against the legal title; the other is the assertion of the legal title as against the presumption of possession. The purpose of requiring a public record in both cases is the same so far as the rights of creditors are concerned; that is, to prevent the one in possession of the property from pledging it to secure the debt of one creditor and then using it as an unincumbered asset to incur other obligations. As between the parties themselves, there is no distinction between the two instruments, in that the failure to record does not disturb the rights of the immediate parties."

And in the *Secor* case, where there was a conditional sale contract which had not been filed within time, or at all, we said:

"Some contention is made by counsel for appellants, seemingly rested upon the theory that appellant Gadbaw's rights have been secured, as he claims them here, by the failure of respondent to file in the office of the county auditor the conditional sale contract, and by Gadbaw becoming a subsequent creditor in good faith of Luther and Mitchell. We are quite unable to see that these facts are of any avail to appellants here. The facts show nothing more than that the sale of the mill to Luther and Mitchell became, in law, an absolute instead of a conditional one, as to subsequent creditors in good faith. But this did not prevent Luther and Mitchell returning the mill to respondent in payment of the balance due upon the purchase price thereof, even though they thereby preferred respondent as a creditor, in the absence of the value of the mill at that time being in excess of the balance due upon the purchase price, or some other element of bad faith or fraud entering into the transaction."

And in the *Watson* case, which was a chattel mortgage case, we said:

"A chattel mortgage not recorded as required by statute (Rem. & Bal. Code, § 3660 [P. C. 349 § 3]) while void as to creditors who have acquired some form of lien upon the mortgaged property, is, nevertheless, valid as between the mortgagor and the mortgagee."

And so in this case, the conditional sale contract was clearly valid as between the original vendor and the vendee; and

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when the vendor, in compliance with that contract, retook possession of the property prior to the time when any creditor obtained a specific lien thereon, and prior to the time the vendee was declared a bankrupt, and prior to the time of the election of the trustee in bankruptcy, the vendor thereupon regained whatever interest he had in the property. The vendee never complied with the contract of purchase, and therefore did not acquire title. The trustee in bankruptcy obtained no more interest in the boiler than the vendee had at the time of the adjudication in bankruptcy.

Upon this rehearing, we are urged by the appellant to reverse our rulings in *Watson v. First National Bank of Clarks-ton*, *Malmo v. Washington Rendering & Fertilizing Co.*, and other cases where we held that the word "creditors" used in our statute means those only who have acquired some form of lien; and we are urged to hold that the word "creditors" refers to all creditors without regard to whether they have acquired specific liens or not. We are satisfied that our holding in those cases is in accordance with the great weight of authority, and decline to enter upon a further discussion of that question.

For the reasons hereinabove stated, the judgment is affirmed.

MORRIS, C. J., ELLIS, MAIN, CROW, and PARKER, JJ., concur.

HOLCOMB, J. (concurring).—I concur in the result herein, but dissent from the holding based on the rulings in the *Watson* and the *Malmo* cases cited, that the word "creditors" as used in the statute on conditional sale contracts means "lien creditors."

FULLERTON, J. (dissenting).—On the hearing of this cause before the Department, two questions only were presented for decision, namely, the validity of the conditional sale contract as to the creditors of the vendee, and the value of the boiler. It was assumed without question by both sides that if the con-

tract was void as to creditors—that is to say, was not signed by both the vendor and vendee, the retaking of the boiler by the vendor was wrongful and recovery could be had by the trustee in bankruptcy. This is made clear by a mere cursory examination of the briefs of counsel. The appellant stated the contentions thus:

“We will content ourselves with discussing the various assignments of error under two general heads. We will first discuss the validity of the alleged conditional sale contract, defendant’s Exhibit 1. Second, we will discuss the only question of fact in the case, namely, the value of the boiler.

“The evidence clearly showed without contradiction that the contract upon which the defendant relied to establish a reservation of title in him, was not signed by the defendant in any manner whatsoever. In fact, it is admitted by stipulation of counsel that the only place where the defendant’s name appears in the instrument at all is in the body of the instrument, in which he is described as the party of the first part and in that instance the name is printed as a part of a regular printed form.

“The first question is one of law, involving the construction of section 3670, Rem. & Bal. Code, relating to conditional sale contracts.

“Plaintiff contends, First: That the instrument is void as to all parties; that it is a mere offer and not a contract, and Secondly: If not absolutely void, then, void as to subsequent creditors in good faith under the statute for the reason that the vendor did not sign the instrument.”

The respondent stated them in the following language:

“The appellant’s counsel brought this action upon the theory, which they are still urging upon this court, that the conditional sale contract—defendant’s Exhibit 1—was not ‘signed by the vendor and vendee’ as required by statute, but that it was signed by the vendee only. This respondent contends that the conditional sale contract was in all respects a contract of sale and that the vendor’s name printed at the top thereof, as party of the first part, with the form filled in by the vendor, the contract signed at the bottom by the vendee, the same then filed by the vendor within ten (10) days after the taking of possession of the boiler by the vendee,

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constituted a compliance with the state statute. In other words, the act of the vendor in placing his name, under which he was doing business as a sole trader, at the top of this contract, even though he caused it to be printed thereon, it being the form which he had prepared for the purpose and which he had filled in and adapted to the particular sale, he having delivered the property and then immediately filed the said conditional sale contract for record in the proper county within ten days, constituted a signing of the instrument within the meaning of the statute and was a compliance with the wording, reason and spirit of the law."

And the concluding part of the respondent's brief is as follows:

"Respondent submits that the decision of the court both upon the point that respondent had signed the contract of sale and that the boiler was of the value of \$200 at the time that it was re-taken, is right and just and that the judgment should be affirmed."

The arguments of counsel at the bar followed the positions as thus outlined. Nowhere was it contended, or even remotely suggested, that the "validity of the conditional sale contract as affected by creditors of the vendee" was not in any manner involved. The Department, assuming that the arguments embraced the entire issue, decided the first question presented adversely to the contention of the respondent, and the second question in accordance with their contention; reversing the trial court only as to the first contention.

The question on which the majority now rests the decision is, therefore, a question not brought before the court on the first hearing, but is a new question presented for the first time in the petition for rehearing. The appellant makes the objection that the change of front comes too late; that the respondent cannot now, after he has submitted his cause to the decision of the court on one question and has met with defeat upon that question, reverse his position and have the cause determined upon another and entirely different question. The majority do not answer or comment upon this ob-

jection, although it seems to me that it but invokes a well-settled principle of appellate practice, and a principle to which we have adhered from the earliest times.

In *Lybarger v. State*, 2 Wash. 552, 564, 27 Pac. 449, 1029, the appellant, after the cause had been submitted and determined, filed a petition for rehearing founded upon an alleged imperfection in the transcript, and for leave to be heard upon the amended record. The court denied the relief, saying that,

“ . . . public policy will not allow cases to be tried by piecemeal. It cannot allow an appellant to rest his case on certain points of the record, and if he fail, to try his case on another and different record.”

To the same effect are *State ex rel. Abernethy v. Moss*, 13 Wash. 42, 42 Pac. 622, 43 Pac. 373; *State v. Harding*, 20 Wash. 556, 56 Pac. 399, 929; *State ex rel. Milwaukee Term. R. Co. v. Superior Court*, 54 Wash. 365, 103 Pac. 469, 104 Pac. 175, and *King v. Upper*, 57 Wash. 130, 106 Pac. 612, 1135, 31 L. R. A. (N. S.) 606. The position of the court is well summed up in the case of *State ex rel. Milwaukee Term. R. Co. v. Superior Court*, in the following words:

“The respondent has filed a petition for a rehearing *En Banc*, wherein it seeks to raise the question that the condemnation sought is for a private and not a public use. This question was not raised, either in the original briefs or in the oral argument, and was not considered by the court. The questions urged by the respondent were: (1) That the relator is not a railroad corporation within the meaning of the eminent domain statute; (2) that the property sought to be condemned was already devoted to a public use, and (3) that there was not a sufficient showing of necessity of appropriation. We cannot sanction the practice of permitting new questions to be raised in a petition for rehearing.

“It is the policy of the law to require parties to present all questions in the briefs originally filed, and not to permit new points to be made in the petition for a rehearing. The rule adopted pursuant to this policy is a salutary one, and one dictated by considerations of justice as well as of expediency. If parties were permitted to submit cases without presenting

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all the material points a loose and slovenly practice would be encouraged, and the administration of justice would be delayed and embarrassed. To tolerate such a practice would impose the duty upon the courts of examining and deciding cases in detached parts, and thus delay decisions, produce confusion and encourage conduct not consistent with fair dealing and good morals.' Elliott, App. Proc., § 557."

I am unable to distinguish the question presented in these cases from the question presented in the case at bar, and I am at a loss to know why the majority think them inapplicable. If the cases are to be overruled it should not be done without comment.

But the conclusion reached upon the merits is, in my opinion, erroneous. The conclusion is rested, as will be noticed, upon the contention that the contract of sale is valid as between the vendor and the vendee, and the assumption that the property was retaken by the vendor before any subsequent creditor of the vendee had acquired a lien upon it. It is this assumption that I do not think the record justifies. While it is true that the property was retaken before the appellant was adjudged a bankrupt, it is equally true that it was retaken after the vendee had become insolvent, whether we fix the time of the retaking as in the month of December, 1912, as do the majority in the *En Banc* opinion, or in the month of February, as did the Department in the opinion filed by it. The evidence makes it clear that the vendee became hopelessly insolvent early in the month of November, 1912, and from that time on was unable, because of its insolvency, to carry on its ordinary business. Since it was a domestic corporation, its property then became, under the trust fund doctrine of this state, a trust fund for the benefit of its creditors, and could not, after that time, be lawfully diverted from the satisfaction *pro rata* of the creditor's claims, either by voluntary mortgages or pledges made by the corporation, or by creditors seeking by attachment or other process to acquire a preferred lien thereon. *Thompson v. Huron Lumber*

Co., 4 Wash. 600, 30 Pac. 741, 31 Pac. 25; *Biddle Purchasing Co. v. Port Townsend Steel W. & Nail Co.*, 16 Wash. 681, 48 Pac. 407; *Cook v. Moody*, 18 Wash. 114, 50 Pac. 1020, 68 Am. St. 872; *Allen v. Baxter*, 42 Wash. 434, 85 Pac. 26; *Washington Liquor Co. v. Alladio Cafe Co.*, 28 Wash. 176, 68 Pac. 444; *Carstens & Earles v. Hofius*, 44 Wash. 456, 87 Pac. 631; *Carroll v. Pacific National Bank*, 19 Wash. 639, 54 Pac. 32; *Burrell v. Bennett*, 20 Wash. 644, 56 Pac. 375.

The principle upon which the doctrine announced rests is that the creditors of the corporation on its insolvency acquire an interest in its property, enabling them to subject such property to the satisfaction of their claims. The precise nature of this interest may be somewhat hard to define, but it is tangible and real nevertheless, and enables the creditors of the insolvent to have the insolvent's property divided among them without preferences of any kind. Being tangible and real, it is an interest which will defeat any mortgage, conditional contract of sale, or other instrument so defectively executed or acknowledged as to be void as to the creditors of mortgagor or vendee who have acquired a specific lien upon the property. In other words, this right of the creditors is a valid, tangible, equitable lien on the insolvent's property, and does not depend for its effect, as the majority seem to imply, upon a judgment of bankruptcy or a judgment of insolvency by a court, but depends upon the fact of insolvency. This rule or doctrine has in this state the force of statute, and the majority err, in my opinion, when they deny its right of enforcement to a trustee in bankruptcy.

The judgment should be reversed.

CHADWICK, J., concurs with FULLERTON, J.

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Syllabus.

[No. 12313. Department Two. June 30, 1915.]

J. R. DICK, *Appellant*, v. NORTHERN PACIFIC RAILWAY
COMPANY, *Respondent*.¹

MASTER AND SERVANT—DISCHARGE—DAMAGES — “BLACKLISTING”—COMPLAINT—SUFFICIENCY. A complaint in an action by a discharged employee for damages through the publication and circulation of false and defamatory reasons for his discharge is insufficient to state a cause of action for blacklisting, where it fails to allege that the publication reached any person to whom plaintiff ever applied for employment or did in fact influence any one not to employ him; and the mere averment of a custom among railroads to require permission to refer to former employers of an applicant is insufficient to imply a conspiracy between railroad companies not to employ discharged employees.

SAME. An allegation in such a complaint that the plaintiff since his discharge has been seeking but has been unable to secure employment, that defendant is continuing to “blacklist” and “boycott” the plaintiff with all other railroad companies, and refused to furnish plaintiff with clearance papers, by reason whereof plaintiff has been compelled to abandon his chosen profession, is insufficient to state a cause of action, in the absence of any specific allegation of any conspiracy or acts constituting any agreement amounting to the blacklisting or boycotting of the plaintiff; such allegations being mere conclusions.

SAME—DISCHARGE—DUTY TO GIVE CHARACTER. In the absence of statute, contract, or custom, there is no duty on the part of an employer to furnish a discharged servant with a certificate of character.

SAME. The violation of the criminal statute against blacklisting, Rem. & Bal. Code, § 6565, gives rise to a civil action for damages.

LIBEL AND SLANDER—SPECIAL DAMAGES—PLEADING. In an action by a discharged servant for libel, there can be no recovery for loss of employment, failure to secure employment, or other specific loss by reason of the publication, unless alleged as special damages.

LIBEL AND SLANDER—MATTER LIBELOUS PER SE—PLEADING—SPECIAL DAMAGES. The publication of a writing discharging an employee “for intimidating company’s employees” is libelous *per se*, as tending to deprive him of public confidence, and to injure him in his social and business intercourse and in the pursuit of his business

¹Reported in 150 Pac. 8.

or occupation, within Rem. & Bal. Code, § 2424, defining criminal libel; hence it is unnecessary to allege special damages.

PLEADING—INDEFINITENESS. Objection to want of definiteness in a pleading must be taken by motion and not by demurrer.

LIBEL AND SLANDER—ACTIONS—LIMITATIONS. Since each publication constitutes a separate offense, a complaint charging the continued publication of a libel up to the time of the commencement of the action is invulnerable to a demurrer raising the bar of the statute of limitations.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered March 5, 1914, upon sustaining a demurrer to the complaint, dismissing an action in tort. Reversed.

R. B. Brown and Thomas R. Horner, for appellant.

C. H. Winders, for respondent.

ELLIS, J.—This is an action for damages by reason of an alleged wrongful publication by the defendant of an untruthful statement of the cause of the plaintiff's discharge by the defendant from employment as locomotive engineer, and preventing the plaintiff from pursuing his chosen occupation.

In the first and second paragraphs of the amended complaint, the corporate capacity of the defendant, and the fact that the plaintiff was, on October 10, 1907, a capable locomotive engineer of good standing and reputation and in the defendant's employ, are alleged. The succeeding paragraphs are as follows:

“(3) That on the said day the defendant railway company, through its officers and agents, with intent to injure the plaintiff, destroy his reputation and good name, and deprive him of the confidence and esteem of his fellowmen, and for the purpose of preventing him from seeking or securing other employment with said company or any other company at all, and to ruin him in his profession as locomotive engineer, caused to be printed and published, and have ever since said time continued to print, publish and circulate, and are now publishing, printing and circulating the following false,

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fraudulent and defamatory instrument in writing, which is as follows, to-wit:

"Discharged Eng'r Dick

Livingstone, Monta.

"Mr. J. R. Dick

Oct. 10, 1907.

"Eng'r Livingstone.

"Dear Sir: This is to advise you that you are hereby discharged from company's services for intimidating company's employees at Whitehall on the 8th inst. while in the performance of their duties. (Signed) Yours truly

"C-40

Nelson

"Cy-Mk-EE

Master Mechanic.'

"(4) That the Northern Pacific Railway Company, according to its usage and custom in vogue, continuously ever since the said 10th day of October, 1907, as well as the custom and usage of every other railway in the United States, refuse to take into their employ, any person who has previously been in their employ, or in the employ of another railway company, unless said applicant makes and signs a written application therefor, which contains in substance the following provisions, to-wit:

"In order that said company may be fully informed as to my personal character and my qualifications for the position for which I have made application, I refer to each of my former employers, and request and authorize each of said companies for whom I have formerly worked, to give to the above named company all information they may be in possession of, whether shown by my personal record, or otherwise, as to my personal character, and also my qualifications for the position that I have herein applied for, and the reason why I was discharged or quit service, upon any inquiry that may be made of them or either of them by said Company' and that by reason of said practice and custom of inserting said clause or a similar or more stringent one in the application of all railroads a person once in the employ of a railroad company and who has been discharged, whether for an honest or dishonest reason or purpose, can never again secure employment with the same or any other company, unless under an assumed name or make false statements in his application.

"(5) That the plaintiff has continuously ever since his discharge as aforesaid, been making diligent effort to secure employment in his chosen profession, and notwithstanding there

has been and still is a demand with all the railway companies in the United States and Canada, he has been and still is unable to secure such employment and the Northern Pacific Railway has ever since said discharge, as aforesaid, continuously and is now continuing to blacklist and boycott this plaintiff with all the railroad companies in the United States and Canada, and has at all times, and still does, refuse to furnish the plaintiff with such a clearance as will enable him to secure other employment, and by reason thereof he has been compelled to abandon his chosen profession and trade and to seek other employment for which he is not specially adapted, to the great injury of his health, happiness and comfort, and to his great humiliation and shame to his damage in the sum of \$50,000."

A demurrer to this complaint on the grounds that it failed to state sufficient facts, and that the action was not commenced within the time limited by law, was sustained. The plaintiff electing to stand upon his pleading, the action was dismissed and he appealed. We designate the parties throughout as plaintiff and defendant.

If the amended complaint can be sustained as stating any cause of action, it must be either, (1) an action on the case for a wrongful interference with the plaintiff's pursuit of an occupation or vocation, in which case specific damages as resulting from the defendant's conduct must be alleged; or (2) an action for libel, in which it must appear that the letter which it is alleged was published by the defendant contained language actionable *per se*, in which case no special damages as resulting therefrom need be alleged.

I. Passing for the present the inquiry as to whether the letter contained matter libelous *per se*, we shall first inquire whether the complaint states facts sufficient to show any special damages to the plaintiff resulting from any wrongful act of the defendant.

The third paragraph, standing alone, states no cause of action for interference with plaintiff's pursuit of an occupation. While it is alleged that the letter was printed, published

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and circulated with "intent" to injure the plaintiff, destroy his reputation and deprive him of confidence, and for the "purpose" of preventing him from seeking or securing employment and to ruin him in his profession, it is not alleged that these effects, or any of them, were ever actually produced by it.

It may be assumed that where there is a custom on the part of railroads to keep a record of the causes of discharge of their employees, that custom enters into and forms a part of every contract of employment, carrying the implied undertaking that no false entry will be made, or if made, that it will not be communicated to any other prospective employer. But no such custom is here pleaded, nor is there any allegation that the printing, publication or circulation of the offending letter consisted in its communication to any prospective employer, or that it did in fact reach any one to whom the plaintiff ever applied for employment, or did in fact influence any one not to employ him. A careful examination of the entire complaint reveals the fact that nowhere does it contain any averment that the alleged damages resulted from any of the acts of the defendant charged in this third paragraph of the complaint.

The plaintiff cites and chiefly relies upon the decision of the supreme court of Kentucky in *Hundley v. Louisville & Nashville R. Co.*, 105 Ky. 162, 48 S. W. 429, 88 Am. St. 298, 63 L. R. A. 289. In that case the complaint was much more definite and direct than that here in its allegations of conspiracy, falsity of record, etc., and at least implied that the record kept by the defendant was communicated to other conspiring railroads; but, like the complaint here, it failed to contain any allegation that the plaintiff was ever refused employment by reason of such false record. Holding the complaint insufficient for that reason, the court said:

"A false entry on the record may utterly destroy and prevent him from making a livelihood at his chosen business. Such false entry must be regarded as intended to injure the

discharged employee; therefore a malicious act. If it is the custom of the railroads of the country to keep such record, and that employees discharged for certain causes are not to be employed by them, then it enters into, and forms part of every contract of employment that neither a false entry shall be made, nor one so made communicated, directly or indirectly, to any other railroad company. . . .

"The petition does not state a cause of action against the defendant. The averments that he had been deprived of the 'right' to again engage in the employment of other railroad companies, and that the alleged wrongful act had made it impossible for him to ever again get employment with other railroad companies, are mere conclusions of the pleader from the facts alleged. *It should have been averred that he had sought, and been refused, employment by reason of the alleged wrongful act. An agreement made with other railroad companies not to employ defendant's discharged employees does not injure the plaintiff unless carried out.* An averment that the defendant conspired and combined with other railroad companies to do an act, if unlawful, would not obviate the necessity of making the averment that he had sought and been refused employment by reason of the alleged wrongful act. Injury is the gist of the action. The liability is damages for doing, not conspiracy. The charge of conspiracy does not change the nature of the act. In an action for damages there must be some overt act, consequent upon the agreement to do a wrong, to give the plaintiff a standing in a court of law. Jaggard on Torts, 638; Cooley on Torts, 279."

The plaintiff argues that, following this case, he has alleged in the fifth paragraph special damages resulting from the printing and publication of the letter in question. An examination of that paragraph fails to disclose any such allegation, or any reference whatever to the things alleged in the third paragraph.

In the fourth paragraph, it is alleged that it is the custom of the defendant and other railroads to refuse to take into their employ any person who has previously been in their employ or in the employ of another railroad, unless the applicant sign a written reference to, and an authorization of, former employers to answer inquiries concerning the appli-

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cant, and that by reason of this custom, a person once in the employ of a railroad company who has been discharged, whether for an honest or a dishonest reason or purpose, can never again secure employment with the same or any other company, except under an assumed name or by false statements in his application. Obviously, the last part of this paragraph states mere conclusions of the pleader not warranted by the facts stated. The discharge of a person for any reason or purpose not reflecting on his character, capacity or fitness for the service would have no tendency, even if the reasons were communicated to other companies, to prevent his employment by such other companies, nor would they have any reasonable tendency to prevent a re-employment by the same company.

Aside from these conclusions, the facts alleged in the fourth paragraph are not connected by any appropriate averment with the damages laid in the fifth paragraph, nor do they in themselves constitute any invasion of the plaintiff's rights or contain anything having a necessary tendency to injure him. There is no allegation that the defendant and other companies had conspired or agreed to furnish information to each other, or that the defendant ever did in fact furnish any information to any other company concerning the plaintiff, or that the defendant and other railroad companies had ever agreed that the consent of either should be a prerequisite to the employment of its discharged employees by any other. It is not even alleged that there is any custom of railroads not to employ discharged employees of other roads. Wanting some such allegation as these, and a claim of resultant damages, the things contained in this fourth paragraph are wholly impertinent to the issue of interference with plaintiff's vocation. *McDonald v. Illinois Central R. Co.*, 187 Ill. 529, 58 N. E. 463. The mere averment of a custom to require permission to refer to former employers of an applicant carries no implication of a conspiracy between railroad companies not to employ discharged employees, nor any implication that the

defendant was accustomed to or had agreed to furnish information as to its discharged employees to other companies even upon inquiry. As said by the supreme court of Illinois in a similar case:

"The fact that the master requires certificates of recommendation from persons seeking employment is certainly no reason why he should be legally compelled to give certificates to those leaving his employment. In this case the testimony produced, showing, or tending to show, that appellant required certificates of recommendation from persons seeking employment with it, does not, in any manner, tend to establish the fact that it gave to persons leaving its employment certificates of like character." *Cleveland, C. C. & St. L. R. v. Jenkins*, 174 Ill. 398, 51 N. E. 811, 66 Am. St. 296, 62 L. R. A. 922, 926.

Passing to the fifth paragraph, we find the allegations that the plaintiff, ever since his discharge, has been seeking, but has been unable to secure, employment, and that the defendant has, and is, continuing to "blacklist" and "boycott" the plaintiff with all railroad companies in the United States and Canada, and "has at all times, and still does, refuse to furnish the plaintiff with such a clearance as will enable him to secure other employment," and by reason thereof the plaintiff has been compelled to abandon his chosen profession, etc. This is the only allegation in the whole complaint charging the defendant with any conduct which has resulted in damage to the plaintiff. This charge makes no reference to any of the acts set forth in the two preceding paragraphs as a ground of damage. The only direct charge of conduct on the defendant's part resulting in damage is found in the averment that the defendant refuses to furnish the plaintiff with such a clearance as will enable him to secure other employment.

In the absence of a statute imposing it, there is no legal duty on the part of an employer to furnish a servant discharged or leaving his service with any certificate of character. At common law, whatever moral obligation rests on

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a master to give to a servant a character belongs to the imperfect class, not enforceable by law. *Carrol v. Bird*, 17 Eng. Ruling Cases 245; *Fell v. Ashburton*, 1 Faculty Collection (Scotch) *446. In the absence of contract, or of custom implying a contract, or a statute so requiring, the same rule prevails in the United States. *Cleveland, C. C. & St. L. R. Co. v. Jenkins*, *supra*; notes to same case, 62 L. R. A. 922; *New York, C. & St. L. R. Co. v. Schaffer*, 65 Ohio St. 414, 62 N. E. 1036, 87 Am. St. 628, 62 L. R. A. 931. See, also, note to *Wabash R. Co. v. Young* (162 Ind. 102, 69 N. E. 1003), 4 L. R. A. (N. S.) 1092.

In this state there is no such statute. It may be assumed that if there were any specific contract to that effect, or if there existed a uniform custom on the part of all railroad companies to give a character to their servants on the termination of the service, or as it is termed in the complaint, a "clearance," the custom would enter into every contract of employment, and the refusal to give some form of clearance would constitute an actionable breach of duty; but even in such a case, the custom must be uniform and must be alleged and proved. *Cleveland, C. C. & St. L. R. Co. v. Jenkins*, *supra*. In the complaint before us, no such custom is alleged; no such contract is set out. There being no statement of any fact raising the legal duty to furnish such a clearance as that described, it follows that the defendant has committed no actionable wrong in failing to furnish it. *McDonald v. Illinois Central R. Co.*, *supra*.

Under the first phase of the case, it only remains to inquire whether the use of the words "blacklist" and "boycott," in the fifth paragraph of the complaint, are sufficient in the connection in which they are used to charge any definite actionable wrong. Black's Law Dictionary, p. 148, defines the word "boycott" as follows:

"A conspiracy formed and intended directly or indirectly to prevent the carrying on of any lawful business, or to injure the business of any one by wrongfully preventing those

who would be customers from buying anything from or employing the representatives of said business, by threats, intimidation, or other forcible means."

We have been cited to no better definition than this, and we believe that, so far as the word has a fixed meaning, this definition expresses it. It is plain that the use of the word "boycott," if it is to be so defined, has no relation to the other things charged in any part of the complaint, and means nothing without some allegation as to what things are charged as constituting the "boycott." There is no such allegation.

Black's Law Dictionary, p. 137, also defines the word "blacklist" as follows:

"A list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate; as where a trades-union 'black-lists' workmen who refuse to conform to its rules, or where a list of insolvent or untrustworthy persons is published by a commercial agency or mercantile association."

It is clear that the specific conduct in other parts of the complaint ascribed to the defendant does not in any way meet this definition. There is no allegation that the defendant made, kept or circulated any such list or any list of its discharged employees, or that the plaintiff's name was ever by the defendant entered on any such list.

Our criminal statute, Rem. & Bal. Code, § 6565, making blacklisting punishable as a misdemeanor, loosely defines the term by declaring any person punishable therefor who shall:

". . . by writing, printing or publishing, or causing the same to be done, the name, or mark, or designation representing the name of any person in any paper, pamphlet, circular, or book, together with any statement concerning persons so named, or publish or cause to be published that any person is a member of any secret organization, for the purpose of preventing such person from securing employment, or who shall willfully and maliciously make or issue any statement or paper that will tend to influence or prejudice the mind

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of any employer against the person of such person seeking employment or any person who shall do any of the things mentioned in this section for the purpose of causing the discharge of any person employed by any railroad or other company, corporation, individual or individuals,”

Touching a somewhat similar statute of Minnesota, the supreme court of that state said:

“Conceding that the word ‘blacklist,’ as used in the title, has no well-defined meaning in the law, either by statute or judicial expression, the general understanding of the term is that it has reference to the practice of one employer presenting to another the name of employees for the purpose of furnishing information concerning their standing as employees, and, so understood, it may have reference to the subject of influencing or coercing employees or employers.” *State ex rel. Scheffer v. Justus*, 85 Minn. 279, 88 N. W. 759, 89 Am. St. 550, 56 L. R. A. 757, 758.

It is apparent from these definitions, whether from statute, text writer or court decision, that the word “blacklist” is a generic term and may mean any one of a variety of things. It has no such well defined meaning in law as to make its use in a pleading a definite charge of any specific misconduct against a person so charged.

We think it must be conceded that the violation of our statute, Rem. & Bal. Code, § 6565 (P. C. 291 § 159), though specifically punishable only by criminal prosecution, is a sufficient basis for a civil action in favor of the person injured. This is a general rule as to the violation of criminal statutes resulting in specific injury to particular persons. *Meshbesh v. Channellene Oil & Mfg. Co.*, 107 Minn. 104, 119 N. W. 428, 131 Am. St. 441; *Osborne v. McMasters*, 40 Minn. 108, 41 N. W. 543, 12 Am. St. 698. But in such a case, the mere allegation that the plaintiff has been blacklisted is not sufficient in view of the variety of meanings attached to that word, not only in common parlance, but in the statute itself. There must be some allegation of the facts constituting the act of blacklisting as defined by the statute, coupled with an allega-

tion that such acts have caused the injury charged. It would seem that, even in a criminal prosecution under this statute, the mere use of the word "blacklist" in the indictment or information would be insufficient, in view of the double definition of that term in the statute. It would be necessary to allege in what the blacklisting consisted, so as to bring the defendant's conduct within some phase of the statutory definition. *United States v. Cruikshank*, 92 U. S. 542; *State v. Muller*, 80 Wash. 368, 141 Pac. 910. So, too, in a civil pleading it seems too plain for argument that, in order to make the conduct of the defendant the basis for an action for damages for blacklisting as defined in the criminal statute, there must be some allegation of facts meeting the statutory definition of blacklisting. The mere charge of blacklisting without stating how the blacklisting was accomplished states a mere conclusion, not an issuable fact.

In the case of *Mattison v. L. S. & M. S. R. R. Co.*, 16 Ohio Dec. 125, cited by plaintiff, the complaint, after setting out the rules of the railroad company known as its "blacklist rules" defining the blacklisting there complained of in specific terms, alleged that these rules were enforced against the plaintiff, and that "by reason of the premises" he was prevented from securing employment in his chosen vocation. There was thus supplied exactly what is wanting in the complaint before us, namely, a specific definition of the general term blacklist, and an allegation of employment of the blacklist so defined, to the injury of the complainant.

In the fifth paragraph there is no reference to any of the allegations in paragraphs three and four to connect the word "blacklist" with those allegations as defining what is meant by the use of that term. So far as it may be said to be defined at all, it is defined as the refusal to grant a clearance, which we have seen, in the absence of a statute so requiring, a contract so stipulating, or a custom so implying, constitutes no legal duty. We think that, soundly, it must be held that the words "blacklist" and "boycott," without any allegation in-

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dicating in what these things consisted, as found in this complaint, are mere epithets or at most mere conclusions. There is not a single allegation or reference to any other part of the complaint defining these words or supplying a definition for them.

We are constrained to hold that the complaint states no cause of action on the case for damages for interference with or preventing the plaintiff from pursuing his occupation or vocation.

II. If the complaint states a cause of action for libel, that statement must be found in the third paragraph. The fourth and fifth paragraphs neither state nor aid in stating such a cause. Returning then to the third paragraph, we find no special damages alleged as resulting from the publication of the letter there set out. To find a cause of action for libel, therefore, we must find that the statements in the letter, which it is alleged were false, are actionable *per se*. If they are, the plaintiff would be entitled to such general damages for humiliation, injured feelings and mental suffering as would naturally result from the publication, without alleging or proving any special or specific damages. *Hanson v. Krehbiel*, 68 Kan. 670, 75 Pac. 1041, 104 Am. St. 422, 64 L. R. A. 790. He could not recover for loss of employment, or failure to secure employment, or other specific loss by reason of the publication. These would be special damages, and not being alleged as resulting from the publication, they cannot be proved.

Our statute defining criminal libel, Rem. & Bal. Code, § 2424 (P. C. 135 § 343), declares, among other things, that every malicious publication by writing, etc., which shall tend to expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse or to injure him in his business or occupation, shall be a libel. We have held that, eliminating the statutory element of malice, actual or implied, the statutory definition meets the essentials of libel actionable *per se* as

generally recognized in civil actions for damages. *Wilson v. Sun Publishing Co.*, 85 Wash. 503, 148 Pac. 774; Newell, Slander & Libel (2d ed.), p. 43. It seems to us that the necessary tendency of the charge that the plaintiff had been guilty of intimidating co-employees would be to deprive him of the benefit of public confidence, and to injure him in both social and business intercourse with those with whom his vocation brought him in contact, and to injure him in the pursuit of his business or occupation. The language of the letter is actionable *per se*. The third paragraph, alleging its continued publication by the defendant, therefore stated a cause of action for libel. The complaint was open to objection for indefiniteness as to the manner of the alleged publication, but this was not ground for demurrer but should have been reached by a motion to make more specific.

Whether in view of the provisions of Rem. & Bal. Code, § 6565 (P. C. 291 § 159), defining blacklisting, the publication of such a statement as that here involved would under any circumstance be privileged is a matter which we are not now called upon to decide. The plaintiff having stood upon his amended complaint, no further amendment can be permitted.

III. It only remains to determine whether the action, considered as one for libel, was barred by the statute of limitations. Under the statute, Rem. & Bal. Code, § 160 (P. C. 81 § 67), an action for libel must be commenced within two years after the cause of action accrued. In the third paragraph of the complaint, it is alleged that the defendant first published the letter in question on October 10, 1907, and ever since that time has continued to print, publish and circulate it. In the law of libel it is elementary that each publication constitutes a separate libel. Odgers, Libel and Slander (5th ed.), p. 172; Newell, Slander and Libel (2d ed.), p. 243; *Woods v. Pangburn*, 75 N. Y. 495; *Rockwell v. Brown*, 36 N. Y. 207. The allegation, therefore, of the continued publication of the offending writing up to the time of the commencement of the

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action is sufficient to render the complaint invulnerable to a demurrer raising the bar of the statute.

The judgment is reversed, and the case is remanded for further proceedings.

Crow, FULLERTON, and MAIN, JJ., concur.

[No. 12634. Department Two. July 7, 1915.]

STANDARD FIRE INSURANCE COMPANY, OF HARTFORD,
CONNECTICUT, *Appellant*, v. H. O. FISHBACK,
as Insurance Commissioner, Respondent.¹

APPEAL—DECISIONS REVIEWABLE—CESSATION OF CONTROVERSY—REPEAL OF ACT—MOOT QUESTION. In an action to enjoin threatened action by the insurance commissioner, where the only question involved is the constitutionality of provisions of an act which was amended pending the appeal by eliminating the provisions in question, the appeal will be dismissed as involving only a moot question; as it will not be presumed that the commissioner will longer enforce the eliminated provisions.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered February 4, 1914, dismissing an action for an injunction, upon sustaining a demurrer to the complaint. Appeal dismissed.

Reynolds, Ballinger & Hutson, for appellant.

The Attorney General (L. L. Thompson, of counsel), for respondent.

PER CURIAM.—The appellant seeks in this action to enjoin respondent from revoking its license to do business in this state. The lower court sustained a demurrer to the second amended complaint, and the appellant having elected to stand upon such complaint, a judgment of dismissal was entered. From such judgment, this appeal is prosecuted.

¹Reported in 149 Pac. 945.

The only question involved is the constitutionality and proper construction of § 24 of the insurance code, relating to deposits of securities by foreign insurance companies. (Laws 1911, p. 188, § 24; 3 Rem. & Bal. Code, § 6059-24.) This section was considered in detail by this court in the case of *State ex rel. Leach v. Fishback*, 79 Wash. 290, 140 Pac. 387. While the appellant makes some contentions which were not then made, we find it unnecessary to consider these contentions for the reason that, since this case was submitted, § 24, *supra*, has been amended by § 5, ch. 177, Laws of 1915, p. 590. The threatened action of respondent, here sought to be enjoined, was based upon certain provisions of the statute which were eliminated by this amendment. Appellant does not contend that the enforcement of that portion of § 24 which was left unchanged by the amendment will interfere with its rights, and the court will not presume that the respondent will seek to revoke appellant's license upon grounds which are no longer in the statute. The only question in controversy has thus become moot.

The rule is well settled in this court that we will not consider cases where nothing but moot or abstract questions are involved. *Vollman v. Industrial Workers of the World*, 79 Wash. 192, 140 Pac. 337, and cases cited.

Following this practice, the appeal will be dismissed without prejudice to the rights of the appellant to bring another action, should defendant attempt to revoke its license upon unauthorized grounds. Neither party will recover costs.

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[No. 12639. Department One. July 7, 1915.]

ROBERT C. HILL *et al.*, *Appellants*, v. FRED W. NEWELL
et al., *Respondents*.¹

PUBLIC LANDS—LANDS UNDER WATERS—GRANTS—BEDS AND SHORES—TITLE. Under the Federal grant to the state, and the assertion of title by Const. art. 17, § 1, to the beds and shores of navigable streams, the title of the state is paramount and absolute, and not restricted to the power of regulation for the purposes of navigation.

NAVIGABLE WATERS—RIPARIAN RIGHTS—TITLE TO BEDS—ABANDONMENT OF STREAM. Riparian owners upon a navigable stream acquire no title to portions of the beds and shores abandoned by the state in improving and straightening the stream, under 3 Rem. & Bal. Code, § 8173a, granting to the commercial waterway district the title to the beds and shores that cease to be a part of the stream; since the state's title is paramount, and riparian rights are subject to the rights of navigation, and extend only to the use and accustomed flow of water, unless new lands result from accretion, reliction, or avulsion.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered August 8, 1914, in favor of the defendants, in an action for an injunction, tried to the court. Affirmed.

E. L. Skeel and *W. M. Whitney*, for appellants.

Shorett, McLaren & Shorett, for respondents.

CHADWICK, J.—Respondents are the commissioners of Commercial Waterway District No. 1, a municipal corporation organized under the act of 1911, Laws of 1911, p. 11 (3 Rem. & Bal. Code, § 8166a), and the act of 1913, amendatory thereof, Laws of 1913, p. 115 (3 Rem. & Bal. Code, § 8170a).

Acting in their public capacity, respondents undertook the improvement and straightening of the Duwamish river, a navigable stream. There is a bend in the Duwamish river as it originally flowed, known locally, and referred to in the record, as the Ox Bow Bend. A part of the improvement

¹Reported in 149 Pac. 951.

made by respondents was to cut a channel through the neck of Ox Bow Bend and to divert the waters so that, instead of flowing around the bend, they will henceforth flow on a straight course toward the mouth of the stream. The plan of improvement provides for the building of a bulkhead to prevent the flow of water into the bend. The effect of the improvement will be to back water into the bend from the point of its lower intersection with the new channel. It is agreed by both parties that a deposit of sediment and silt will gradually accumulate in the channel of the bend and that it will eventually become so filled as to be useless for navigation. The present improvement is, in effect, an abandonment on the part of the state of that part of the Duwamish river for purposes of navigation.

Appellants are the owners of abutting property, and have brought this action to restrain the filling of the old channel and its ultimate sale by the waterway district. We understand the real question which is submitted for our opinion is whether the title to the abandoned bed is in appellants or the waterway district.

Appellants make an engaging argument based upon the theory that the power and authority of the Federal government over navigable waters is expressly limited to a sovereign power of regulation for the purposes of navigation; citing *Scott v. Lattig*, 227 U. S. 229; *Sweet v. City of Syracuse*, 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289; *United States v. Chandler-Dunbar Water Power Co.*, 209 U. S. 447; *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 168 U. S. 349, 358; and further, that "all title and power of control by the state of Washington over the beds and waters of a navigable stream comes from a transfer of that power from the United States government and is not in any degree greater than the rights of the United States government itself, and is, therefore, simply a sovereign power of regulation for the purposes of navigation, and the proprietary rights of riparian owners are *jure natura*, subject,

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however, to this sovereign control. *Union Depot etc. Co. v. Brunswick*, 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789; *Hobart v. Hall*, 174 Fed. 438; *Willow River Club v. Wade*, 100 Wis. 86, 76 N. W. 273, 42 L. R. A. 305."

It is apparent that appellants have misconceived their standing. Their argument, as well as the cases relied on, is based on the doctrine of riparian proprietorship; that is, that the abutting owner is the owner of the bed of the stream, whether navigable or nonnavigable, subject only to the right of navigation; that the state takes no more than a right to maintain such waters as commercial highways, and that its assertion of title to the beds and shores of navigable streams and lakes is no more than an assertion of such right.

No such limitation is to be found in the Federal grant, nor is the assertion of title on the part of the people, art. 17, § 1, qualified in any way:

"The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: Provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state."

Navigable streams and lakes are as much a part of the public domain as are the lands abutting or adjoining, and the grantee of the government takes only such title as is granted by it. It is a rule that a grant from the government will not be enlarged by construction.

"The general rule of construction applying to grants of public lands by a sovereignty to corporations or individuals is that the grant must be construed liberally as to the grantor and strictly as to the grantee, and that nothing shall be taken to pass by implication." 26 Am. & Eng. Ency. Law (2d ed.), p. 425.

In consequence, it has been the uniform holding of the supreme court of the United States that it will recognize and

administer the law prevailing in the particular state when passing upon the extent of its own grant, when that grant is bordered or intersected by a navigable stream or lake. *Shively v. Bowlby*, 152 U. S. 1; *St. Anthony Falls Water Power Co. v. St. Paul Water Com'rs*, 168 U. S. 349, 361; *County of St. Clair v. Lovington*, 23 Wall. (90 U. S.) 46, 68; *Barney v. Keokuk*, 94 U. S. 324, 338; *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646, 660; *Goodtitle v. Kibbe*, 9 How. (50 U. S.) 470; *Packer v. Bird*, 137 U. S. 661; *Scranton v. Wheeler*, 179 U. S. 141, 187; *Mobile Transportation Co. v. Mobile*, 187 U. S. 479; *Pollard v. Hagan*, 3 How. (44 U. S.) 212.

This court held in the case of *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632, that the state's title to the beds and shores of navigable lakes and streams is paramount and absolute, and that an abutting owner has no riparian or littoral right in the waters and shores of the stream. See *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278, and *State ex rel. Ham, Yearsley & Ryrie v. Superior Court*, 70 Wash. 442, 126 Pac. 945, where the cases stating this rule are collected. If it were held that these abutting owners had a riparian right, their remedy would be to compel the flow of the waters in their accustomed way, because the right of riparian proprietorship would still be subject to the right of navigation. The riparian right is a right to the use and accustomed flow of water. It is not a right in the bed of a stream unless new land results from accretion, reliction or avulsion.

While it is admitted that much that is said in the case of *Newell v. Loeb*, 77 Wash. 182, 137 Pac. 811, is apparently decisive of this case, it is insisted that our holding was not necessary to that decision and should not be followed. We have reexamined that case, and while it may be that some of the argument there employed might have been omitted, yet, nevertheless, we are satisfied that it states the true rule where it says of the appellants in that case that "the fact, if it be

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a fact, that their land borders upon the shore of the [Duwamish] river does not give them any right either in the bed of the stream or the waters thereof." The same question was met and discussed by the supreme court of California in the case of *People v. California Fish Co.*, 166 Cal. 576-584, 138 Pac. 79:

"In *Ward v. Mulford*, 32 Cal. 372, the court said: 'Such land is held by the state in trust and for the benefit of the people. The right of the state is subservient to the public rights of navigation and fishery, and theoretically, at least, the state can make no disposition of them prejudicial to the right of the public to use them for the purposes of navigation and fishery, and whatever disposition she does make of them her grantee takes them upon the same terms upon which she holds them, and, of course, subject to the public rights above mentioned,' " citing cases.

This is in effect the holding of this court. The case continues:

"It is also settled that in the administration of this trust when the plan or system of improvement or development adopted by the state for the promotion of navigation and commerce cuts off a part of these tide lands or submerged lands from the public channels, so that they are no longer useful for navigation, the state may thereupon sell and dispose of such excluded lands into private ownership or private uses, thereby destroying the public easement in such portion of the lands and giving them over to the grantee, free from public control and use. On this subject in *Illinois C. Ry. Co. v. Illinois*, 146 U. S. 452, (36 L. Ed. 1018, 13 Sup. Ct. Rep. 118), the court said: 'It is grants of parcels of lands under navigable waters, that may afford the foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state.' . . .

"The most striking instance of the exercise of this power of absolute disposition of such tide or submerged lands by

the state of California is found in the laws providing for the improvement of the water-front of San Francisco. By these laws the water-front line was fixed, cutting off from navigation a large area of land which was subject to the daily flux and reflux of the tides and part of the lands always under water, upon which line a sea wall was constructed, and the area landward of this wall was subsequently surveyed into lots and streets, sold into private ownership and filled in for private use. This area now constitutes a large portion of the business section of San Francisco. The following cases recognize the authority of the state to make such absolute disposition of these particular lands: *Eldridge v. Cowell*, 4 Cal. 87; *Guy v. Hermance*, 5 Cal. 74, 68 Am. Dec. 85; *Hyman v. Read*, 13 Cal. 444; *Holladay v. Frisbie*, 15 Cal. 634; *Wheeler v. Miller*, 16 Cal. 125; *Seabury v. Arthur*, 28 Cal. 142; *People v. Klumpke*, 41 Cal. 277; *Knight v. Haight*, 51 Cal. 171; *Friedman v. Nelson*, 53 Cal. 589; *LeRoy v. Dunkerly*, 54 Cal. 459; *Knight v. Roche*, 56 Cal. 21; *People v. Williams*, 64 Cal. 498; *San Francisco v. Straut*, 84 Cal. 124, 24 Pac. 814. In view of these well settled propositions it is obvious that the claim of the plaintiff to the effect that such lands cannot, under any circumstances, be alienated in fee to private parties to the exclusion of the public, cannot be sustained."

We conclude, therefore, that the judgment of the court holding that the title to the bed of the Duwamish river, being in the state by title absolute and subject to its disposition, passed, upon its abandonment by the respondents, to the Commercial Waterway District, under 3 Rem. & Bal. Code, § 8173a, was the proper judgment to be entered.

Affirmed.

MORRIS, C. J., MOUNT, HOLCOMB, and PARKER, JJ., concur.

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[No. 12680. Department Two. July 7, 1915.]

THE STATE OF WASHINGTON, *on the Relation of Walter G. Hufford, Respondent*, v. STARK M. EDDINGS, *Appellant*.¹

STIPULATIONS—EFFECT—ELECTIONS—CONTESTS. In an election contest, insufficiency in the pleadings is waived by a stipulation that the ballots be produced and a recount made by the court.

ELECTIONS—BALLOTS—MARKING—CERTAINTY. A ballot designating the voter's choice by a cross in the space opposite a candidate's name is not rendered void for uncertainty by the insertion of a zero in the space opposite the name of the candidate's opponent; since the voter's choice reasonably appears from the face of the ballot, under Rem. & Bal. Code, §§ 4905 and 4927, providing for counting such ballots.

SAME—BALLOTS—MARKING—DISTINGUISHING MARKS. The insertion of a zero, opposite the name of the opponent of a candidate, voted for by making a cross in a space opposite his name, is not such a distinguishing mark as to invalidate the ballot, within Rem. & Bal. Code, § 4914; since it does not appear that it was intended as a distinguishing mark or was made in willful violation of the law.

Appeal from a judgment of the superior court for Skamania county, Darch, J., entered December 24, 1914, upon findings in favor of the plaintiff, in proceedings to contest an election. Reversed.

E. E. Shields, for appellant.

W. S. Hufford and *Miller & Wilkinson*, for respondent.

ELLIS, J.—This is an action brought under the provisions of Rem. & Bal. Code, § 4941 (P. C. 167 § 109), to contest an election.

At the general election held on November 3, 1914, the contestee, whom we shall designate as the appellant, and the contestant, whom we shall designate as the respondent, were opposing candidates for the office of county clerk for Skamania county. Both of their names appeared in legal form upon the official ballots for use in the several election pre-

¹Reported in 149 Pac. 945.

cincts of that county. The precinct election boards returned as cast for the appellant 450 votes, and for the respondent 449. The county canvassing board confirmed this count, found the appellant elected, and a certificate of election was issued to him. The respondent instituted this contest.

We shall not discuss the sufficiency of the pleadings to present an issue warranting a recount of the ballots, since it was stipulated in open court at the trial below that all of the ballots cast in the county might be produced and a recount made in open court of the ballots cast for the respective parties for the office of county clerk. By this stipulation, the parties, of course, waived any insufficiency in the pleadings.

Pursuant to this stipulation, the court recounted the ballots, rejecting one as illegal and void. On the rejected ballot, which is in evidence as an exhibit, in the square to the right of the name of the appellant, designated as the place for marking, appears a cross, thus [X]. In the corresponding square, to the right of the name of the respondent, appears a zero mark, thus [O]. Like marks are similarly placed with reference to the respective names of two or three of the opposing candidates for other offices. Otherwise the ballot, so far as marked at all, is marked regularly with the crosses in the squares to the right of the names of the candidates voted for. The rejection of this ballot resulted in a tie. The court so finding, entered judgment cancelling the appellant's certificate of election and ordering the contest to be decided by lot, as provided by the statute in such cases. This appeal followed.

No question being raised as to the counting of any other ballot than the one above referred to, the sole question presented for our determination is whether the rejected ballot should have been counted for the appellant. The question presents two aspects: (1) Is the ballot void for uncertainty in expressing the voter's choice? (2) Do the zero marks constitute such distinguishing marks as to invalidate the bal-

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lot? Both of these questions have, in effect, been answered in the negative by our own decisions.

In *State ex rel. Orr v. Fawcett*, 17 Wash. 188, 49 Pac. 346, the trial court rejected thirty-five ballots because the cross was placed to the left instead of the right of the names of the persons voted for. It rejected some thirty ballots for various irregular markings, of which the following are given in the opinion as samples: On one the cross was placed to the right of the name of Fawcett for mayor and to the right of each of certain candidates for other offices. Horizontal black pencil lines were drawn through the name of Orr for mayor and through the names of opposing candidates for the other offices. Upon that part of the ballot providing for voting for and against certain amendments to the city charter, ten long heavy lines in blue pencil were drawn. Another of these ballots was marked with crosses to the right of the name of Fawcett for mayor and to the right of the names of certain candidates for other offices, and a straight lead pencil mark was drawn through the names of the respective opposing candidates. Others of these ballots were marked with two crosses to the right of the names of Fawcett and those of certain other candidates and two crosses to the right of each place provided for voting for the charter amendments. This court held that all of the foregoing ballots were improperly rejected by the trial court and should have been counted. It also appears that some twenty-seven ballots were variously marked with words which the trial court held to be distinguishing marks invalidating the ballot. Four of these are described in the opinion. One was marked with two crosses, about one and one-half inches apart, to the right of the name of Fawcett, and single crosses to the right of the names of certain other candidates and in the places provided for voting for some of the charter amendments. Following others of the amendments was the word "No," written in pencil, and to the right of that a cross mark. Following one of the amendments appeared the words, "Don't want any king." Another of the

ballots had the word "rats" written on the proposed amendments. Two others had written in the margin names, presumably of the persons voting them. Touching these twenty-seven ballots, this court said:

"These four ballots, we think, were properly excluded by the court, for the words written were not so written with any intention on the part of the elector to express his choice of a candidate. They were not honest mistakes and showed a frivolous and wanton disposition on the part of the elector to disregard the election laws. The rest of the ballots, however, under this finding, we think were erroneously rejected. The words or signs which the court objected to were generally the word 'no' after amendments, or 'for' after amendments, or 'against' or 'yes' and pencil lines which were evidently made with the intention of making plain the expression of the voter. One ballot had a cross to the right of the name 'Fawcett' and a cross to the right of 'Orr', and the cross to the right of Orr was penciled over and obliterated. This was ballot 164, and the finding was that the cross was made to the right of each of the words 'Fawcett', 'Ovington', 'Metcalf', 'Quevli' and 'Watson', and that an 'X' was made to the right of the words 'Edward S. Orr', and afterwards obliterated by having pencil marks run over and drawn through the same. The evident intention of the voter was to correct a mistake which he had made in putting the cross to the right of Orr instead of Fawcett. We think the contention of the appellant should be sustained that fifteen of these votes should have been counted for Fawcett and eight for Orr, and that Fawcett should therefore have an additional credit of seven votes."

The court quotes as controlling §§ 391, 401 and 413 of Hill's Code. They are the same as found in our present statute. Reading by section numbers from Rem. & Bal. Code, they are as follows:

"§ 4905. In the canvass of the votes, any ballot or parts of a ballot from which it is impossible to determine the elector's choice shall be void and shall not be counted: Provided, that when a ballot is sufficiently plain to gather therefrom a part of the voters' intention, it shall be the duty of the judges of election to count such part."

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"§ 4914. The voting shall be by ballot. No ballot shall bear any impression, device, color, or thing designated to distinguish such ballot from other legal ballots, or whereby the same may be known or designated." . . .

"§ 4927. . . . but no ticket shall be lost for want of form, or mistake in initials of names, if the board of judges can determine to their satisfaction the person voted for and the office intended."

The court then says:

"It will therefore be seen that our statute is very different from, and has more carefully guarded the rights of electors by making provision for mistakes which are necessarily incident to this system, than the statutes of some of the other states. Whatever may be said of the Australian system, a glance at the ballot at a general election is sufficient to convince anyone that it is not an easy thing for a person of common understanding to intelligently and without great chance of mistake express his wish. A person accustomed more to the plow or the plane than to the pen would almost certainly be confused when he was ushered into a dark booth with this ticket, with its multifarious provisions and its immense dimensions spread out before him. Indeed, it is probable that the most careful business man who has been accustomed to perusing and executing documents of a business character, will have grave misgivings as to the correctness of his vote when he leaves the booth. And to hold that every misconception of the printed directions of the law would deprive an elector of his vote, would certainly be a holding not within the contemplation of the legislature which passed the statute we have just mentioned, for it has been careful to provide that when a ballot is sufficiently plain to gather therefrom a part of the voter's intention it shall be the duty of the judges of election to count such part. The whole is composed of parts, and if it is the duty of the judges of the election to count a part when the intention in relation to such part can be ascertained, it follows that they must count the whole ballot when the intention in relation to all of the parts can be ascertained."

After a lengthy and exhaustive discussion of the authorities from other states, the court concludes by quoting from

the decision of the supreme court of Nebraska in *State ex rel. Waggoner v. Russell*, 34 Neb. 116, 51 N. W. 465, 33 Am. St. 625, the following as a statement of the correct rule under our statute:

"It is not every mark by means of which a ballot might subsequently be identified which is a violation of the statute. The mark prohibited by law is such a one, whether letters, figures or characters, as shows an intention on the part of the voter to distinguish his particular ballot from others of its class. . . . The fact that a number of ballots are, without any evidence of fraudulent intention on the part of the voters, distinguishable from others cast at the same polling place, as, for instance, marked with a pencil or with ink of a different color, does not bring them within either the letter or spirit of the statute."

We have discussed this case thus fully because the defective ballots there counted and those rejected so aptly illustrate the rule of intention there announced. In *State ex rel. Hyland v. Peter*, 21 Wash. 243, 57 Pac. 814, this court, citing the decision in the *Fawcett* case, said:

"In the case last cited we held, that it is not every mark by means of which a ballot might subsequently be identified which is a violation of the statute; that the mark prohibited by law is such a one,—whether letters, figures or characters,—as shows an intention by the voter to distinguish his ballot from others of its class, or some wilful or wanton disregard of the election laws."

A reading of the statutes above quoted clearly supports the rule of intention laid down in the *Fawcett* case and followed in the *Peter* case as the correct criterion by which to determine whether a ballot improperly marked shall be rejected or counted. It is too clear for argument that the statute intends, as these decisions hold, that, if the intention of the voter to cast his vote for a given candidate can be reasonably determined by an inspection of the ballot, it must be so counted; and that, before a ballot irregularly marked can be rejected as bearing an illegal distinguishing mark, it must

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reasonably appear from the face of the ballot that the voter intended the irregular marks as distinguishing marks or made them in wilful disregard of the law, and not as mere corrections or as further showing his choice as between candidates in addition to the statutory cross. Judged by this rule of intention, there can be no question that the rejected ballot should have been counted for the appellant. The intention to vote for the appellant is plain on its face. The zero mark opposite the name of the respondent was clearly intended merely to emphasize that intention. It cannot be reasonably gathered from an inspection of the ballot that the zero marks were placed upon the ballot for any other purpose. They were never intended as distinguishing marks. To discard this ballot after having directed the counting of many ballots much more distinctively marked in the *Fawcett* case, would smack of caprice.

The judgment is reversed, and the cause is remanded with direction to restore to the appellant his certificate of election.

MORRIS, C. J., FULLERTON, CROW, and CHADWICK, JJ., concur.

[No. 12460. Department One. July 13, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHN ARCHIE
HESS, *Appellant*.¹

CRIMINAL LAW—APPEAL—REVIEW—HARMLESS ERROR. Error in receiving the statement of a witness that accused first denied his guilt, but afterwards admitted it, is cured where the witness immediately stated the exact language of the accused.

RAPE—EVIDENCE—CORROBORATING EVIDENCE—SUFFICIENCY. In a prosecution for statutory rape, evidence that accused admitted that he was guilty, after having been accused of the offense by the prosecutrix in the presence of others, is sufficient as corroborating evidence, within the requirement of Rem. & Bal. Code, § 2443.

RAPE—INSTRUCTIONS—CORROBORATING EVIDENCE. In a prosecution for statutory rape, under Rem. & Bal. Code, § 2443, requiring corroboration of the testimony of the female, it is not error to instruct that the slightest corroboration may be sufficient if it tends to connect defendant with the commission of the offense.

SAME. In a prosecution for statutory rape, under Rem. & Bal. Code, § 2443, requiring corroboration of the testimony of the female, it is not error to give an instruction allowing the jury to consider all the evidence, including that of the female, as well as the corroborating testimony, if there is any; since it is only by comparison that its corroborative effect can be determined.

RAPE—EVIDENCE—PHOTOGRAPHS—ADMISSIBILITY. In a prosecution for statutory rape, in which it appeared that the accused had repeatedly taken the prosecutrix with him on automobile trips, and taken photographs of her and himself in secluded places, the photographs are admissible as evidence of opportunity to commit the offense.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered June 20, 1914, upon a trial and conviction of rape. Affirmed.

Robert Welch and *John F. Dore*, for appellant.

Alfred H. Lundin and *Lane Summers*, for respondent.

HOLCOMB, J.—Appellant was prosecuted and convicted upon an information charging him with the statutory crime

¹Reported in 150 Pac. 6.

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of carnal knowledge of a female child under the age of fifteen years, and of the age of fourteen years, under Rem. & Bal. Code, § 2436 (P. C. 135 § 367).

I. The chief contention of appellant, in the superior court and here, is that "the evidence was not sufficient to justify the verdict, there being an entire lack of corroborative testimony required by statute." The offense was alleged to have been committed in April, 1913, at which time the statute (Rem. & Bal. Code, § 2443; P. C. 135 § 381) requiring corroboration of the female against whom the crime was committed had not been repealed, but was then in force.

There was evidence that appellant had repeatedly taken the girl alone with him on automobile rides and took pictures of her and himself, in some instances in secluded places upon (apparently) country roads; that on April 21, 1913, the date of the offense charged, he had taken her somewhere in an automobile. On April 23, 1913, the girl having been detained by the juvenile officers at the Y. W. C. A., her mother, a woman doctor, a deputy prosecuting attorney, a school truancy officer, and the defendant being present, the girl made certain statements in his presence concerning his relations with her; that a physical examination of the girl had been made; that thereupon appellant asked that he be allowed to confer with the girl and her mother; that they went into another room, where appellant talked with the mother. She testified that he then "begged that he and the girl could get married; that at first he denied his guilt, but later on he admitted it."

The appellant moved to strike out this testimony as a conclusion of the witness, which was denied by the court and appellant excepted. The mother continued her testimony and said: "He (appellant) kept on begging that they could get married. I said I would consider it if he was guilty of what he was accused of. He said, 'Yes, it is true,' and he still kept on begging that he could marry her." The refusal of the court to strike the answer, "He at first denied his guilt

but later he admitted it," was probably erroneous, although in some jurisdictions, on similar statements, they have been admitted as proper as being mere abridgments of the conversation in substance, or the conclusion of the witness is a mere shorthand rendition of the substance of the spoken words of another. It would be better, of course, especially in a criminal prosecution, when life or liberty is at stake, for the court to require the witness to repeat the words of another, especially of an accused person in relation to the thing with which he is accused, to the best of the recollection of the witness, in substance as nearly as the witness can reproduce the language of the other. In this instance, however, it was not prejudicial to the accused, for the reason that the witness herself immediately cured the defect by stating the exact language of the accused as to his guilt. It does not do to argue, as does appellant, that the conversation did not imply that he answered that it was true that he was guilty of this offense. That specific matter had been under discussion in the other room immediately preceding the conversation with the mother. He had heard the statements of the girl, in the presence of the others, that "he was responsible" and the like. He himself testified, in alluding to the conversation with the mother, and in trying to put a different conversation in their mouths, that "in fact, they all believed I had had intercourse with the girl." It is obvious that he was not in the least doubtful as to what he was accused of, if he answered the mother that it was true.

The testimony as to such admission of guilt by the appellant, if believed, was ample corroboration of the testimony of the girl. The weight and credibility to be given that testimony, as to all the testimony, was for the jury. It is not for us to weigh the evidence. It was for the jury to say whether appellant made the admission testified to by the mother and its meaning, beyond a reasonable doubt. *State v. Jonas*, 48 Wash. 133, 92 Pac. 899; *State v. Workman*, 66 Wash. 292, 119 Pac. 751.

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II. Complaint is further made as to the refusal to give certain instructions requested by appellant and the giving of other instructions. We shall not set forth the requested instructions. They were quite lengthy and extended and incorporate therein perhaps most of the expressions used by this court, especially the strongest of them, upon the subject of instructing juries as to the necessity for, requirements of, and nature of corroborating testimony of the female in such cases. The court might have given these extended instructions, but he apparently preferred to give shorter and just as meaningful instructions. He instructed as to corroboration as follows, substantially:

"No conviction shall be had for the crime charged in this information upon the testimony of the female . . . unless supported by other evidence. The testimony of the female child upon or regarding where the crime was committed must be supported or corroborated by credible evidence. It is not necessary that her testimony be corroborated substantially in every detail. It is not necessary that the corroborative evidence be sufficient of itself without the aid of her testimony to prove guilt.

"The slightest corroboration of her testimony may be sufficient if it tends to connect defendant with the commission of the offense. Whether it is sufficient or not is a question for the jury and depends upon the consideration of all the evidence, including that of the female as well as the corroborating testimony, if there is any. Your minds must be satisfied beyond a reasonable doubt as the court has heretofore defined the same."

Appellant claims that the instruction that "the slightest corroboration of her testimony is sufficient," is erroneous. Appellant requested substantially the same instruction in these words: "It may be either direct or circumstantial, *and however slight*, it must tend to connect the defendant with the crime." We see no essential difference between the words used and the words requested in that particular, and consider either of them proper instructions. Appellant further complains that the court's instructions directed the

jury that they "might consider all of the testimony, *including that of the female* as well as the corroborating testimony, if there is any." There is no other way of determining whether any evidence is corroborative than by comparing it with the other evidence and ascertaining whether the one supports the other. The instruction was not erroneous. *State v. Carpenter*, 124 Iowa 5, 98 N. W. 775; *State v. Smith*, 124 Iowa 334, 100 N. W. 40.

III. Further error is claimed in the admission of the photographs. We see no error. The photographs were admitted by appellant to have been taken by himself—as to those of the prosecutrix and his automobile—and they were admissible anyway to show the nature of some of the places where he was with the prosecutrix and the fact that he had opportunities to commit the crime. That there were also photographs in the bunch of himself and other women could not possibly have prejudiced him by leading the jury to believe him guilty of the offense with the female named in this prosecution, nor lead them to infer that he was guilty of offenses with the other women, who had nothing to do with the case.

There is no prejudicial error in the record. Judgment affirmed.

MORRIS, C. J., PARKER, and MOUNT, JJ., concur.

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[No. 12479. Department One. July 13, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. JOSEPH
DRISCOLL, *Appellant*.¹

EVIDENCE—JUDICIAL NOTICE. The supreme court takes notice of the fact that the superior court of King county is composed of several judges.

CRIMINAL LAW—TRIAL—HABITUAL CRIMINALS—PROCEDURE—DIFFERENT JUDGES—SENTENCE. Under Rem. & Bal. Code, § 2178, of the habitual criminal statute, which provides that the court shall . . . before sentence impanel a jury to try the fact of former conviction, the principal case may be tried by one of the judges, and the supplemental charge of being an habitual criminal may be tried by another judge of the same court, although the statute makes no provision for trials by separate judges; and either judge may consider both verdicts in determining the sentence.

SAME—HABITUAL CRIMINALS—SENTENCE. Under Rem. & Bal. Code, § 2178, of the habitual criminal statute, requiring the supplemental charge of being an habitual criminal to be tried before sentence in the principal case, it is not necessary to pronounce judgment before a trial is had upon the supplemental proceeding, although the trials are had before different judges.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 20, 1914, upon a trial and conviction of being an habitual criminal. Affirmed.

George McKay and *Thomas Byron MacMahon*, for appellant.

John F. Murphy and *S. H. Steele*, for respondent.

MOUNT, J.—The appellant, Joseph Driscoll, and two others were jointly charged with the crime of robbery. Upon a trial, all three of the defendants were found guilty by a verdict of a jury. After this verdict was returned and before sentence, a supplemental information was filed charging the appellant, Driscoll, with being an habitual criminal. The trial upon the charge of robbery was before the Honorable

¹Reported in 150 Pac. 2.

J. T. Ronald, one of the judges of the superior court for King county, and the trial of the supplemental information was referred to and had before the Honorable Mitchell Gilliam and a jury. This trial before Judge Gilliam resulted in a verdict finding the appellant guilty of being an habitual criminal. Thereupon Judge Gilliam entered an order adjudging "that said defendant is guilty of being an habitual criminal as charged in the information." Thereafter, Judge Ronald took into consideration the judgment of Judge Gilliam and sentenced the appellant to the penitentiary for a period of not less than ten nor more than twenty-five years. This appeal is taken from that judgment.

Several errors are assigned in the appellant's brief; but most of these alleged errors were disposed of in *State v. Conroy*, 82 Wash. 417, 144 Pac. 538, which was an appeal by Conroy from the judgment entered in the original case, to which the appellant in this case was a defendant. We are satisfied with our conclusion upon these points and shall, therefore, not consider them further.

The only assignment in this case not discussed in the *Conroy* appeal is that the law does not authorize the trial of the original action to be had by one judge, and the trial of the supplemental charge by another judge. The statute relating to a case of this kind is found at Rem. & Bal. Code, § 2178, and is as follows:

"If the defendant pleads guilty to the principal charge, or, if after trial, he shall be found guilty of such principal charge by a jury, unless the defendant admit the fact of such former conviction or convictions, the court shall . . . before sentence, impanel a jury to try the fact of such former conviction or convictions, and if such jury find, from the record thereof, or other competent evidence that such person has been once or twice before convicted of a crime, which under the laws of this state would amount to a felony, such jury shall make a return of such fact to the court. In case that such jury find that such person has been but once before convicted of a felony, the return shall show the time of his sentence under such former conviction."

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And § 2179 provides:

"In every case where a person is convicted of a felony and the jury impaneled for that purpose, in the manner provided in section 2178, find that the person has been once before convicted of a crime, either in this state or elsewhere, which under the laws of this state would amount to felony . . . he shall be sentenced to a term in the penitentiary of not less than double the time of the sentence upon the former conviction. . . ."

The appellant contends that it was error for the judge who tried the original case to refer the trial of the supplemental information to another judge. He argues that there is no law for such a proceeding. It is apparent that the appellant was tried by the same court upon both issues. The fact that two different judges participated does not change that fact. Section 2178, it is true, makes no provision for another judge to try the defendant upon a supplemental information. The statute says: "the court shall . . . before sentence, impanel a jury to try the fact of such former conviction." This court takes notice of the fact that the superior court for King county is composed of several judges. We think it cannot be reasonably contended that, because the facts were determined by different judges of that court, these facts are not determined by the court. No authorities are cited by the appellant to the effect that, in a case of this kind, the principal case may not be tried by one of the judges of the court and the supplemental charge by another judge of the same court, and that the judge who tried the principal case may not, upon all the findings, pronounce a final judgment. It is apparent that the final judgment was the judgment of the court. The findings of fact upon which the judgment was based were regularly found, and were required by the statute to be considered, and it was not error for either judge to take into consideration both verdicts in determining what sentence should be pronounced.

Some point is made that Judge Ronald did not sentence the appellant upon the original trial before the supplemental

J. T. Ronald, one of the judges of the superior court for King county, and the trial of the supplemental information was referred to and had before the Honorable Mitchell Gilliam and a jury. This trial before Judge Gilliam resulted in a verdict finding the appellant guilty of being an habitual criminal. Thereupon Judge Gilliam entered an order adjudging "that said defendant is guilty of being an habitual criminal as charged in the information." Thereafter, Judge Ronald took into consideration the judgment of Judge Gilliam and sentenced the appellant to the penitentiary for a period of not less than ten nor more than twenty-five years. This appeal is taken from that judgment.

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"If the defendant pleads guilty to the principal charge, or, if after trial, he shall be found guilty of such principal charge by a jury, unless the defendant admit the fact of such former conviction or convictions, the court shall . . . before sentence, impanel a jury to try the fact of such former conviction or convictions, and if such jury find, from the record thereof, or other competent evidence that such person has been once or twice before convicted of a crime, which under the laws of this state would amount to a felony, such jury shall make a return of such fact to the court. In case that such jury find that such person has been but once before convicted of a felony, the return shall show the time of his sentence under such former conviction."

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And § 2179 provides:

"In every case where a person is convicted of a felony and the jury impaneled for that purpose, in the manner provided in section 2178, find that the person has been once before convicted of a crime, either in this state or elsewhere, which under the laws of this state would amount to felony . . . he shall be sentenced to a term in the penitentiary of not less than double the time of the sentence upon the former conviction. . . ."

The appellant contends that it was error for the judge who tried the original case to refer the trial of the supplemental information to another judge. He argues that there is no law for such a proceeding. It is apparent that the appellant was tried by the same court upon both issues. The fact that two different judges participated does not change that fact. Section 2178, it is true, makes no provision for another judge to try the defendant upon a supplemental information. The statute says: "the court shall . . . before sentence, impanel a jury to try the fact of such former conviction." This court takes notice of the fact that the superior court for King county is composed of several judges. We think it cannot be reasonably contended that, because the facts were determined by different judges of that court, these facts are not determined by the court. No authorities are cited by the appellant to the effect that, in a case of this kind, the principal case may not be tried by one of the judges of the court and the supplemental charge by another judge of the same court, and that the judge who tried the principal case may not, upon all the findings, pronounce a final judgment. It is apparent that the final judgment was the judgment of the court. The findings of fact upon which the judgment was based were regularly found, and were required by the statute to be considered, and it was not error for either judge to take into consideration both verdicts in determining what sentence should be pronounced.

Some point is made that Judge Ronald did not sentence the appellant upon the original trial before the supplemental

J. T. Ronald, one of the judges of the superior court for King county, and the trial of the supplemental information was referred to and had before the Honorable Mitchell Gilliam and a jury. This trial before Judge Gilliam resulted in a verdict finding the appellant guilty of being an habitual criminal. Thereupon Judge Gilliam entered an order adjudging "that said defendant is guilty of being an habitual criminal as charged in the information." Thereafter, Judge Ronald took into consideration the judgment of Judge Gilliam and sentenced the appellant to the penitentiary for a period of not less than ten nor more than twenty-five years. This appeal is taken from that judgment.

Several errors are assigned in the appellant's brief; but most of these alleged errors were disposed of in *State v. Conroy*, 82 Wash. 417, 144 Pac. 538, which was an appeal by Conroy from the judgment entered in the original case, to which the appellant in this case was a defendant. We are satisfied with our conclusion upon these points and shall, therefore, not consider them further.

The only assignment in this case not discussed in the *Conroy* appeal is that the law does not authorize the trial of the original action to be had by one judge, and the trial of the supplemental charge by another judge. The statute relating to a case of this kind is found at Rem. & Bal. Code, § 2178, and is as follows:

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The appellant contends that it was error for the judge who tried the original case to refer the trial of the supplemental information to another judge. He argues that there is no law for such a proceeding. It is apparent that the appellant was tried by the same court upon both issues. The fact that two different judges participated does not change that fact. Section 2178, it is true, makes no provision for another judge to try the defendant upon a supplemental information. The statute says: "the court shall . . . before sentence, impanel a jury to try the fact of such former conviction." This court takes notice of the fact that the superior court for King county is composed of several judges. We think it cannot be reasonably contended that, because the facts were determined by different judges of that court, these facts are not determined by the court. No authorities are cited by the appellant to the effect that, in a case of this kind, the principal case may not be tried by one of the judges of the court and the supplemental charge by another judge of the same court, and that the judge who tried the principal case may not, upon all the findings, pronounce a final judgment. It is apparent that the final judgment was the judgment of the court. The findings of fact upon which the judgment was based were regularly found, and were required by the statute to be considered, and it was not error for either judge to take into consideration both verdicts in determining what sentence should be pronounced.

Some point is made that Judge Ronald did not sentence the appellant upon the original trial before the supplemental

trial was had; and, also, that Judge Gilliam, before whom the supplemental hearing was had, did not enter a sentence. The statute itself provides that if, after the trial, the defendant be found guilty of the principal charge, the court shall before sentence impanel a jury to try the fact of such former conviction; indicating very clearly that it is not necessary to pronounce judgment upon the original conviction before a trial is had upon the supplemental information. The procedure in this case is substantially the procedure which was sustained in *State v. Miller*, 78 Wash. 268, 138 Pac. 896, where we held:

"The jury, having returned a verdict of guilty, a supplemental information was then filed charging appellant with being an habitual criminal, upon which appellant was tried and convicted."

There was no error in the method of the trial, or in the judgment and sentence. The judgment is therefore affirmed.

MORRIS, C. J., PARKER, HOLCOMB, and CHADWICK, JJ.,
concur.

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Opinion Per MAIN, J.

[No. 12496. Department Two. July 14, 1915.]

UNION MACHINERY & SUPPLY COMPANY, *Respondent*, v. H.
W. STUCHELL *et al.*, *Appellants*.¹

APPEAL—RECORD—EXHIBITS. Exhibits can only be made part of the record on appeal by bill of exceptions or statement of facts.

APPEAL—RECORD—BILL OF EXCEPTIONS. Upon a trial *de novo* in an equitable case, in the absence of a bill of exceptions or statement of facts, the only question presented is whether the findings support the judgment.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered July 15, 1914, upon findings in favor of the plaintiff, in an action to foreclose a chattel mortgage, tried to the court. Affirmed.

Earl W. Husted, for appellants.

Robert A. Eaton, for respondent.

MAIN, J.—The purpose of this action was to foreclose a chattel mortgage upon certain logging equipment and logging machinery. The chattel mortgage, at the time of its execution, was a part of a combination instrument which constituted a lease, an option to purchase, and a chattel mortgage. This instrument was executed and filed as a chattel mortgage. The defendant H. W. Stuchell claims under a subsequent bill of sale from the mortgagor. The defendant Lester Stuchell was the assignee of certain lien claims. These defendants appeared by answer and cross-complaint. After the issues were framed, the cause was tried to the court. The trial court found that the claims of all the defendants were subsequent and inferior to the rights of the plaintiff under the chattel mortgage, and entered judgment accordingly. The defendants above mentioned appeal.

No bill of exceptions or statement of facts has been brought to this court. Certain exhibits are sought to be made a part

¹Reported in 150 Pac. 8.

of the record by being included in the clerk's transcript. But exhibits introduced in evidence upon the trial of a case in the superior court can only be made a part of the record upon appeal by a bill of exceptions or statement of facts. By being included in the clerk's transcript, they become no part of the record. Rem. & Bal. Code, §§ 390, 395 (P. C. 81 §§ 687, 697; *Kennedy Drug Co. v. Keyes Drug Co.*, 58 Wash. 499, 109 Pac. 56; *Staats v. Pioneer Ins. Ass'n*, 55 Wash. 51, 104 Pac. 185; *Thurman v. Kildall*, 80 Wash. 283, 141 Pac. 691. There being no bill of exceptions or statement of facts, the only question that can be considered is whether the findings support the judgment. *McMillan v. Stone*, 79 Wash. 119, 139 Pac. 753; *Dabney v. Stearns*, 70 Wash. 579, 127 Pac. 192.

The findings of the trial court are somewhat voluminous and complicated. Without reviewing these findings in detail, it may be said that a careful consideration of them leads to the conclusion that the judgment is supported by the findings.

The judgment will therefore be affirmed.

MORRIS, C. J., ELLIS, FULLERTON, and CROW, JJ., concur.

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Opinion Per MAIN, J.

[No. 12504. Department Two. July 14, 1915.]

JOHN ARMSTRONG, *Respondent*, v. J. S. WHEELER *et al.*,
Appellants.¹

EVIDENCE—PAROL EVIDENCE—TO VARY WRITING—AMBIGUITY. A written contract to construct the cement walls of the basement of a building in a "first-class workmanlike manner" is not ambiguous, but has a well defined meaning; hence it is inadmissible to show by parol that the walls were agreed to be so constructed as to prevent water from leaking through them.

CONTRACTS—WRITTEN CONTRACTS — MODIFICATION — EVIDENCE. A subsequent oral modification of a written contract for the construction of a building must be shown by clear and convincing evidence.

Appeal from a judgment of the superior court for King county, Smith, J., entered May 29, 1914, in favor of the plaintiff, in an action to foreclose a mechanics' lien, tried to the court. Affirmed.

A. W. Hastie, for appellants.

Gill, Hoyt & Frye, for respondent.

MAIN, J.—The purpose of this action was to foreclose a lien for a balance claimed to be due upon a written contract for the construction of a concrete basement. The defendants counterclaimed for damages, alleging defective workmanship. A judgment was entered in favor of the plaintiff for \$165 and the costs of the action. The defendants have appealed.

On September 8, 1913, the appellants, being then the owners and occupiers of a certain dwelling house, contracted with the respondent in writing for the construction of a concrete basement under such dwelling house. This contract provided that the basement should be constructed in a "first-class, workmanlike manner." Another provision of the contract was for "Full cement walls of 8-inch thickness, and cement floor-basement to be 7½ feet in the clear." The contract price was

¹Reported in 150 Pac. 5.

\$615. After the contract was executed, the respondent entered upon the performance of the work. After the work was completed, the appellants, claiming that the work was defective, refused to make full payment as provided for in the contract.

Upon the trial, the appellants offered evidence to the effect that it was the understanding of the parties at the time the contract was drawn that the concrete walls of the basement were to be constructed in such a manner as to prevent water from leaking through them, and for this purpose the outside surface of the walls should have been coated with a mixture of cement and fine sand, and a drain tile should have been put around the house to carry away the seepage from the hillside.

If the contract by its terms was ambiguous upon its face, oral evidence was admissible for the purpose of determining its meaning. If it was not ambiguous, the trial court ruled correctly in refusing to admit the evidence offered. The provision of the contract is, that the work shall be done "in a first-class workmanlike manner." The term "workmanlike manner" when applied to constructive work, such as that in question, has a well defined meaning. 40 Cyc. 2861; 8 Century Dictionary. Hence the contract upon its face is not ambiguous. Oral testimony to add to, vary, or modify its terms was inadmissible. The question as to whether the basement was constructed in a first-class, workmanlike manner was one of fact. *Smith v. Clark*, 58 Mo. 145; *Holland v. Rhoades*, 56 Ore. 206, 106 Pac. 779.

The testimony as to whether the basement was constructed in a first-class, workmanlike manner, offered by the respective parties, was in conflict. The trial court, after hearing this testimony, was of the opinion that there was not "anything deficient in the building of that wall," and that "it was the kind of a wall that Armstrong agreed to build, and it was the kind of a wall provided for in the contract."

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Opinion Per MAIN, J.

Another contention of the appellants is that the basement as constructed was not 7½ feet in the clear, as provided in the contract. The respondent claims that, during the progress of the work, the contract in this respect was modified by agreement of the parties. Here, likewise, the evidence is conflicting. Without detailing the testimony or the circumstances, we are of the opinion, after a careful consideration of the testimony, that the view of the trial court that the contract had been modified by oral agreement must be sustained. In reaching this conclusion, the rule that, where a party to a written contract seeks to prove a subsequent oral modification of its terms, the evidence of such modification must be clear and convincing, has not been overlooked. *Dinsmore Sawmill Co. v. Falls City Lumber Co.*, 70 Wash. 42, 126 Pac. 72.

It is also claimed that the workmanship was defective in some other particulars which it does not seem necessary to review in detail. It is sufficient to say that, after a careful consideration of all the evidence, we are unable to say that the judgment of the trial court was erroneous.

The judgment will be affirmed.

MORRIS, C. J., CROW, FULLERTON, and ELLIS, JJ., concur.

[No. 12299. Department Two. July 14, 1915.]

**HAYES & PORTER, INCORPORATED, *Appellant*, v. AMOS WOOD
et al., Respondents.¹**

SALES—RESCISSION BY VENDEE—DECEIT—RECOVERY OF PURCHASE MONEY. Deceit in stating the earnings of a hotel by grossly overstating the amount, padding the register and filling the rooms with nonpaying roomers, warrants rescission of a sale of the business and furniture and recovery of the purchase money paid, where the same was relied upon by the purchaser.

SAME—RESCISSION—JUDGMENT—SCOPE OF RELIEF. In an action to recover possession of hotel property sold, upon plaintiffs declaring a forfeiture for nonpayment of the purchase price, which was successfully defended on the ground of deceit, defendant asking a rescission, it is error to enter judgment for defendant for the money paid only; but the same should further provide for a cancellation of the sale, a return of the purchase money notes, and the restoration of possession to the plaintiff.

Appeal from a judgment of the superior court for King county, Smith, J., entered March 21, 1914, upon findings in favor of the defendants, in an action of forcible entry and detainer, tried to the court. Reversed.

McCafferty, Robinson & Godfrey, for appellant.

C. H. Steffen (*Andrew J. Balliet*, of counsel), for respondents.

FULLERTON, J.—On October 1, 1913, the appellant entered into a contract of sale with the respondents, by the terms of which they agreed to sell to the respondents the furniture, fixtures, good will and business of the Hotel Cadillac, which occupied the two upper stories of the brick building situated at 168 Jackson street, in the city of Seattle. The purchase price was \$3,500; \$1,500 of which was paid in cash and the balance evidenced by 40 promissory notes of \$50 each, payable one each month following the transfer, with interest at

¹Reported in 150 Pac. 1.

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Opinion Per FULLERTON, J.

six per centum. The appellant was a lessee of the building in which the hotel was conducted, and the respondents agreed to pay to the appellant as their rental share of the building, monthly in advance, the sum of \$300, and to pay for the light, heat, fuel and water used by them in connection with the operation of the hotel; the contract of sale providing that failure to make any of such payments when the same became due would operate as a forfeiture of the contract of sale.

The respondents took possession of the hotel on the execution of the contract and continued therein until the first of November, at which time they refused to pay either the advance rental then due, the note then matured for \$50, or the bills for heat, light, or water incurred during October. The appellant thereupon declared the contract and the payments made thereon forfeited, and began the present action to recover possession of the hotel property, executing a delivery bond and taking possession of the same through the office of the sheriff.

The respondents, answering the complaint, set up that they had been overreached in the transaction and induced to enter into a contract of purchase of the hotel property through the fraud and deceit of the appellant, its officers and agents, and asked for a cancellation of the contract, for a return to them of the notes executed and delivered to the appellant, and for a recovery of the sums paid on the purchase price.

Issue was taken on the affirmative matter in the answer, and a trial had on the issue of fraud and deceit. The court found in favor of the purchasers, and as conclusions of law therefrom, found that the purchasers were entitled to a cancellation of the contract of sale, the return of the notes given to evidence the deferred payments, and a return of the sums paid upon the purchase price. It entered judgment, however, for the recovery of the money only, no mention being made therein concerning the return of the notes or the cancellation of the contract of purchase.

The appellant's chief contention is that the evidence fails to support the findings of the court with reference to the charge of fraud and deceit. But without reviewing the evidence at length, we think it ample in this respect. The principal controversy was whether the appellant had misrepresented the prior earnings of the hotel, and on this question it was shown that its agents had not only grossly overstated the amount, but had padded the hotel register, and had filled up the rooms with "dead heads," or nonpaying roomers, in order to make it appear that the business was thriving. Moreover, when the respondents had opportunity to investigate the claimed earnings, it was found that the hotel had been losing money for a long time past, and that during the month of October it did not earn anywhere near a sufficient sum to meet the fixed charges. To deceive concerning the earnings of the hotel was to deceive concerning a material matter, entitling the respondents, when the misrepresentations were proven, to the relief granted them. *Bunck v. McAulay*, 84 Wash. 473, 147 Pac. 33; *Duffy v. Blake*, 80 Wash. 648, 141 Pac. 1149; *Becker v. Clark*, 83 Wash. 37, 145 Pac. 65; *Christensen v. Koch*, 85 Wash. 472, 148 Pac. 585.

The appellant complains, with more reason we think, of the form of the judgment entered. It was, as we have before stated, a judgment merely for the recovery of the sum paid by the respondents upon the contract price of the hotel agreed to be purchased, and did not adjudicate the rights of the parties as to all of the issues. This was error. The appellant is entitled to a judgment settling all of the issues, that it may not be harassed with further suits or actions. The judgment will be reversed, therefore, and the cause remanded with instructions to enter a judgment in favor of the respondents: (1) Cancelling the contract of sale of the hotel property; (2) directing that the notes given to evidence the deferred payments be delivered up and cancelled; (3) for a recovery against the appellant in the sum of \$1,500; and (4)

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Statement of Case.

a judgment in favor of the appellant against the respondents confirming its possession of the hotel property. Neither party will recover costs in this court.

MORRIS, C. J., MAIN, ELLIS, and CROW, JJ., concur.

[No. 12695. Department Two. July 14, 1915.]

CHARLES BACKLUND, *Respondent*, v. PUGET SOUND TRACTION,
LIGHT & POWER COMPANY, *Appellant*.¹

CARRIERS—STREET CARS—EJECTION OF INTOXICATED PASSENGER—EVIDENCE—SUFFICIENCY. The conductor of a street car is justified in removing an intoxicated passenger where it appears that he repeatedly fell asleep, with his feet extending into the aisle and doorway where passengers must enter, the conductor made unsuccessful efforts to keep him awake, and he fell once or twice into the aisle of the car.

SAME—CARE IN EXPULSION—EVIDENCE—QUESTION FOR JURY. Liability for removing an intoxicated passenger from a street car in an unreasonable manner is sustained by evidence to the effect that the conductor took him from the car and dropped him upon the street, and then carried him out of the way of traffic and dropped his head and shoulders upon the sidewalk with his back across the curb, resulting in injury; the question being for the jury where there was conflicting evidence.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$310 for injuries sustained in the ejection of an intoxicated passenger from a street car is not excessive, where the plaintiff, a blacksmith, earning \$3.50 a day, claimed an injury to his back, he did not work for seven or eight weeks, and then received but \$3 per day, and there was some evidence of pain and suffering.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 2, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

James B. Howe and *H. S. Elliott*, for appellant.

Green & Chester, for respondent.

¹Reported in 150 Pac. 3.

MAIN, J.—This action was brought for the purpose of recovering damages claimed to be due to the wrongful ejection of the plaintiff from a street car operated by the defendant in the city of Seattle. All the material allegations of the complaint were denied by the answer of the defendant. The cause was tried to the court and a jury, and resulted in a verdict in favor of the plaintiff in the sum of \$310. Motions for judgment notwithstanding the verdict, and for a new trial, were made and overruled. Judgment was entered upon the verdict. The defendant appeals.

On Saturday, April 11, 1914, at about the hour of 11 o'clock p. m., the plaintiff, in a very much intoxicated condition, boarded one of the appellant's street cars in the business section of the city, for the purpose of being conveyed to his home, which was in the vicinity of Green Lake, in the northern part of the city. After getting aboard the car, he occupied one of the rear seats, and soon fell asleep. His feet extended out into the aisle and doorway through which passengers must enter. The conductor of the car made a number of unsuccessful efforts to keep him awake, and to prevent him from interfering with the comfort and the convenience of other passengers. After the car had proceeded some distance, and while it had stopped for the purpose of either receiving or discharging passengers, the conductor removed the respondent from the car and left him upon the street or sidewalk. Once or twice, before the time of the removal, the respondent had fallen from the seat upon which he was sitting into the aisle of the car.

The appellant claims that the condition and conduct of the respondent was such as to cause annoyance and discomfort to other passengers, and that, therefore, the removal was rightful and lawful. The respondent claims that the manner of removal was such as to unnecessarily cause an injury to his back, for which the action was brought.

It is a rule of law, supported by both reason and authority, that where the conduct or condition of an intoxicated passen-

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ger is such as to cause annoyance or discomfort to other passengers or where his condition or conduct is such as to render it probable that he would occasion discomfort or annoyance to other passengers if permitted to remain in the car, it is not only the right but the duty of the employees of the transportation company in charge of the car to remove such person therefrom. But in the removal of an intoxicated passenger it is necessary that the conductor exercise reasonable care, in view of all the surrounding facts and circumstances, to the end that the person so removed may not be unnecessarily injured. 2 Nellis, *Street Railways* (2d ed.), § 336; *Lemont v. Washington & Georgetown R. Co.*, 1 Mackey 180, 47 Am. Rep. 238; *Edgerly v. Union St. R. Co.*, 67 N. H. 312, 36 Atl. 558; *Berry v. Carolina C. & O. R. Co.*, 155 N. C. 287, 71 S. E. 322; *Murphy v. Union R. Co.*, 118 Mass. 228; *Hudson v. Lynn & Boston R. Co.*, 178 Mass. 64, 59 N. E. 647. Without further detailing the facts, it may be said that, under the rule of law stated, the conductor of the street car upon which the respondent was riding was justified in removing him. If the case rested upon the fact of removal, there would be no liability on the part of the appellant company.

The judgment can only be sustained if the evidence relative to the manner of removal was sufficient to carry the question to the jury whether the conductor exercised reasonable or ordinary care in that regard. The testimony of the respondent's witnesses tends to support the claim that, after the conductor took him from the car, the respondent was first dropped upon the street; then picked up and carried out of the way of traffic upon the street and dropped with his head and shoulders upon the sidewalk and his feet and legs projecting into the street, with his back across the curb. The appellant's evidence tends to show that, when the respondent was first removed from the car, the conductor attempted to set him against the curb, but that the respondent was too intoxicated to sit up. Thereupon the conductor placed him upon the sidewalk. The testimony as to the manner of re-

removal was given by the conductor and certain of the passengers who were upon the car at the time. The respondent himself had no knowledge as to the manner of his removal. We think there is sufficient evidence to carry the question to the jury as to whether the conductor dropped the respondent with his head and shoulders upon the sidewalk, with his feet and legs projecting into the street and his back across the curb, and thereby injured him, or whether the removal took place in the manner detailed by the witnesses for the appellant. If the evidence offered on behalf of the respondent is true, it became a question for the jury to determine whether or not the conductor had exercised reasonable care in view of all the surrounding facts and circumstances.

It is claimed also by the appellant that the verdict is excessive. There was evidence that the respondent did not work for seven or eight weeks after the time in question; that, prior to that time, he was receiving \$3.50 per day as a blacksmith, and after returning to work subsequent to the injury he received \$3 per day. There was an allegation in the complaint as to pain and suffering, and some evidence to support this claim. If these facts are true, we cannot say that the verdict is such as to show passion and prejudice on the part of the jury.

The judgment will be affirmed.

MORRIS, C. J., ELLIS, FULLERTON, and CROW, JJ., concur.

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Syllabus.

[No. 12064. Department One. July 20, 1915.]

UNIVERSITY STATE BANK, *Respondent*, v. THE CITY OF
BREMERTON, *Appellant*.¹

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—WARRANTS—DEFENSES—NONNEGOTIABILITY. Any defense available against contractors in public work to whom a nonnegotiable warrant was issued is available against their assignee.

SAME—LOCAL IMPROVEMENTS—WARRANTS—ACTIONS—DEFENSES—ESTOPPEL. The issuance of a final warrant to a contractor on public work which included the amount of a fixed estimate for the city's expenses for which the city should have issued a separate warrant to be indorsed by the contractor and returned to the city, does not estop the city from interposing the defense of a credit therefor, in an action on the warrant issued.

SAME—LOCAL IMPROVEMENTS—WARRANTS—PAYMENT—EVIDENCE—SUFFICIENCY. The evidence establishes that a certain city warrant issued to a contractor on public work was not intended to apply as a payment on the last warrant issued but was intended to apply on prior warrants, where the amount exactly equalled the total of a sum due on one of the prior warrants plus a sum indorsed on another prior warrant, of which there was no evidence that the holder, a bank, had received the money, and no evidence that the city had paid it.

SAME—LOCAL IMPROVEMENTS—WARRANTS—ACTIONS—DEFENSES—CREDITS—ESTOPPEL. Where it is impracticable until after final settlement to determine or withhold the amount of cash discounts due from a contractor to a city by reason of cash payments of property owners, the city is not estopped from claiming a credit therefor by reason of its nonretention of a thirty per cent protection fund for which the contract provided.

LIMITATION OF ACTIONS—LOCAL IMPROVEMENT—WARRANTS—NOTICE OF FUND. An action upon a final warrant drawn on a special improvement fund is not barred by the statute of limitations, where the plaintiff had no knowledge of the condition of the city fund within three years prior to the commencement of the action.

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—WARRANTS—INTEREST. In an action upon a special fund warrant expressly providing that it is noninterest bearing, interest should not be allowed on the warrant.

¹Reported in 150 Pac. 439.

Cross-appeals from a judgment of the superior court for Kitsap county, French, J., entered January 17, 1914, in favor of the plaintiff, in an action for an accounting, tried to the court. Modified.

Jas. W. Carr, for appellant.

Higgins & Hughes (*Hyman Zettler*, of counsel), for respondent.

CROW, J.—Action by University State Bank, a corporation, against the city of Bremerton and certain of its officials to recover \$2,373.74 on a local improvement warrant. From a judgment in plaintiff's favor against the city for \$1,736.22, the city appeals and the plaintiff cross-appeals.

As both parties have appealed, we will refer to them as plaintiff and defendant. The facts seem to be that on August 17, 1908, McDermott & Driscoll, contractors, made two separate bids for the improvement of certain streets in local district No. 34. One bid was for certain unit prices in the event the city made payment in local improvement bonds. The other was for lower unit prices for payments to be made in cash. A contract was entered into for the larger unit prices and for payments in bonds. Shortly thereafter, for the benefit of property owners who might desire to pay cash and obtain the lower unit prices, a supplemental contract was entered into, which, after acknowledging the prior contract, the alternative cash payment bid, and the desire of the city to preserve to property owners the privilege of making cash payments, provided as follows:

"It is agreed that for all cash paid prior to the date for the issuance of the said bonds under the said ordinance and contract, such discount or allowance shall be made by the said McDermott & Driscoll, for the benefit of the said property owners making such cash payments, as will give to them and all of them the same benefit, allowance, or deduction as would have been given them had the city accepted the said cash proposal of the said McDermott & Driscoll."

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Opinion Per CROW, J.

It is practically conceded that the total saving thus made to property owners paying cash amounted to \$641.71 or \$637.52, the former amount being alleged in the original complaint, and the latter being alleged by amendment subsequently made. Further material terms in the contract, relating to what are designated as "fixed estimate" and "protection fund," read as follows:

"It is hereby expressly provided that the warrants which shall be issued to the contractor in the amount of *actual cost* dollars, in payment of the fixed estimate for list of owners, engineering and advertising expenses incident to this improvement shall be by him properly endorsed, made payable to, and delivered to the city clerk for transfer by him to the proper funds to meet said expenses, and the contractor for this improvement shall have no claim to any portion of the warrants issued in payment of said fixed estimate, except to endorse and deliver them as herein provided."

The evident intention of this stipulation was that, whereas the city had incurred certain preliminary expenses for engineering, obtaining names of property owners, and publishing advertisements, which it was contemplated should be refunded by the contractors, a warrant for the exact amount of such expenses (subsequently found as a "fixed estimate" to be \$1,310.39) should be issued to the contractors, and upon the special improvement fund, and by them should be indorsed and delivered to the city clerk, so that the city might collect the same and reimburse itself. The contract further provided that:

"On or about the 20th day of each month during the progress of said work, bonds and warrants shall be issued for seventy per cent of the contract price of the estimated amount of said work returned by the city engineer as having been done during the preceding calendar month, and the balance of said contract price, being thirty per cent thereof, shall be retained to secure the payment of laborers who shall have performed work thereon, and materialmen who have furnished materials therefor."

Eight nonnegotiable, noninterest bearing, special fund warrants were issued from time to time by the city in payment for the work, totaling \$25,721.40, the entire contract price, estimated on the higher unit prices. It appears that of this amount \$2,409.77 was to be paid by the city from its general fund as its proportion of the cost of the improvement. It is a fair inference from the record that, if the city had converted this \$2,409.77 into the special improvement fund, as it should have done (*Hemen v. Ballard*, 40 Wash. 81, 82 Pac. 277), that fund, together with discounts due property owners who had paid cash, would have been sufficient to fully satisfy all special fund warrants which the city issued.

All special fund warrants issued by the city were pledged to the plaintiff by the contractors as collateral security, and warrant No. 8, the one upon which this action is predicated, was purchased afterwards by the plaintiff. Warrants Nos. 1 to 7 were paid and are not in dispute. Warrant No. 8, the last one issued under the contract, was issued on June 7, 1909, for \$3,932.13, on the special improvement fund. It is not disputed that, on October 16, 1909, \$1,558.39 was paid on this warrant. All other payments claimed by the city are disputed. The record is incomplete and unsatisfactory. Exhibits referred to in the statement of facts and the abstract have been lost, cannot be found, and are not before us. It clearly appears, however, that the city officials have failed to keep accounts in such a manner as will enable any one to ascertain the exact condition of the special improvement fund. It seems to be conceded that an assessment was levied on the property of all owners who did not pay cash, and there is no contention that it was not fully collected by the city. The principal difficulty is to ascertain how the fund has been disbursed.

Plaintiff commenced this action on or about March 27, 1913, against the city, its mayor, clerk and treasurer, to recover \$2,373.74, the difference between the conceded payment of \$1,558.39 and the face value of warrant No. 8. It asked

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an accounting and judgment against such of the defendants as should be found responsible, demanding such accounting by reason of the unsatisfactory condition of the city records and the dereliction of the city officials. The defendants pleaded payment as follows:

"Fixed estimate, for which the contractors had failed to endorse a warrant to the city.....	\$1,310.39
"Payment on July 24, 1909, by general fund warrant No. 2413.....	1,099.38
"Payment on October 16, 1909, not in dispute...	1,558.39

"Total.....\$3,968.16"

The payments thus pleaded exceeded the face value of warrant No. 8 by \$36.03, which the city claimed was allowed as interest. Defendants further allege that no allowance had been made to the city, as provided by the supplemental contract, for discounts to property owners who made payments in cash, and that by reason thereof \$641.71 was due from the contractors. When No. 8, the final special fund warrant was issued, the city should have issued two warrants, one for \$1,310.39, the amount of the fixed estimate, to be indorsed and returned to the city clerk, and one for \$2,621.74; but it issued a single warrant, No. 8, for \$3,932.13, and no warrant was issued, indorsed, or redelivered to the city clerk to refund the fixed estimate. The trial court held that the city was estopped from claiming any credit for the fixed estimate, as it issued a single final warrant without protecting itself or deducting the amount then due it. In refusing this credit, the trial court committed prejudicial error. The warrant is non-negotiable, and any defense available against the original contractors to whom it was issued is also available against their assignee. *Union Savings Bank and Trust Co. v. Gelbach*, 8 Wash. 497, 36 Pac. 467, 24 L. R. A. 359; *Bardsley v. Sternberg*, 17 Wash. 243, 49 Pac. 499; *West Philadelphia Title & Trust Co. v. Olympia*, 19 Wash. 150, 52 Pac. 1015; *State ex rel. Olympia Nat. Bank v. Lewis*, 62 Wash. 266, 113 Pac. 629.

Under the doctrine announced in these cases, it would seem that the city is entitled to interpose any defense against warrant No. 8 in this action which it might have interposed as against the original contractors. If the original contractors still held the warrant, the city undoubtedly could claim credit for \$1,310.39, the fixed estimate to which it is entitled. We fail to see why it may not claim the same credit as against the plaintiff in this action. The credit should have been allowed.

The dispute over the alleged payment of \$1,099.38, pleaded by the city and claimed on account of general fund warrant No. 2,413, involves the proper application of the amount for which that warrant was issued. The bank claims the general fund warrant was given to apply as part payment upon, and was credited upon, special fund warrants Nos. 6 and 7, while the city claims that it was issued as part payment upon, and should have been credited upon, warrant No. 8, now held by plaintiff. At the time general fund warrant No. 2,413 was issued, special fund warrants numbered from 1 to 6, inclusive, totaling \$15,640.71, had been paid, with the exception of \$640.71 remaining due on special fund warrant No. 6. At that time, special fund warrant No. 7 had not been paid. Its later payment seems to be evidenced by certain indorsements, one of which is for \$458.67. This indorsement is not explained. The bank which held the warrant has no record of having received the money called for by the indorsement, and the city has no record showing its payment. It will be noted that the amount remaining due on special fund warrant No. 6 when general fund warrant No. 2,413 was issued, together with the indorsement of \$458.67 on special fund warrant No. 7, totals \$1,099.38, the exact amount for which general fund warrant No. 2,413 was issued. The bank insists that this fact sustains its contention that general fund warrant No. 2,413 was given in payment of these two items, while the city contends that \$458.67, credit on warrant No. 7, was paid either in cash or by check, and that the \$640.71 was due the

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city as discounts for cash paid by property owners. The city introduced no satisfactory evidence of the payment of the \$458.67 on warrant No. 7, and the allegations of their answer that the discount to be allowed by the contractor was \$641.71 was, during the trial, amended to \$637.52. These facts convince us that the trial court correctly found that general fund warrant No. 2,413 was not given as part payment upon, or to apply on, special fund warrant No. 8, but was issued as payments on special fund warrants Nos. 6 and 7, and was so applied. It is therefore manifest that general fund warrant No. 2,413 was not issued as part payment upon special fund warrant No. 8, upon which this action is based.

Plaintiff does not contend that the contractors in whose place it stands have paid discounts due on account of cash payments made by property owners. The city contends that it was impracticable to withhold such discounts, as the exact amount thereof could not be, and was not, determined prior to the final issue of the warrants. The court allowed the defendant credit for these discounts, but the bank argues that the city should be estopped to claim the same by reason of its nonretention of the thirty per cent protection fund for which the contract provided. For the reasons above stated, we hold that the city is not estopped and that the credit was properly allowed.

Defendants claim that plaintiff's right of action has been barred by the statute of limitations, but it is apparent that the plaintiff had no knowledge of the condition of the city fund within three years prior to the commencement of this action, and for the reasons announced in *Hemen v. Ballard*, *supra*, and cases there cited, we hold that the statute has not run.

Plaintiff contends, also, that the court erred in not allowing interest upon the warrants. Its warrant expressly stipulates that it is a noninterest bearing instrument. This being true, we fail to see that the trial court committed any error in this regard.

The judgment of the trial court will be modified by allowing the city credit for \$1,810.39, the amount of the fixed estimate, and the judgment for \$1,736.22, heretofore entered in plaintiff's behalf, will be reduced to that extent. The defendant city will recover its costs on this appeal.

MORRIS, C. J., CHADWICK, and PARKER, JJ., concur.

[No. 12348. Department Two. July 20, 1915.]

WILLIAM DONTANELLO, *Appellant*, v. ADOLPH A. GUST *et al.*,
Respondents.¹

WATERS AND WATER COURSES—ADVERSE USE—TITLE—EXTENT OF RIGHT. The right to the use of flowing waters may be acquired by prescription, resulting in the vesting of title as if acquired by deed, the extent of the right depending upon the nature and character of the adverse uses.

SAME—ADVERSE USE—BY LOWER PROPRIETOR—TITLE—EVIDENCE—SUFFICIENCY. While generally the use of waters by a lower proprietor is not adverse, title to the waters of a spring is acquired by a lower proprietor, where, during the entire statutory period, he infringed upon the rights of an adjoining owner by constructing a ditch, dam and an intake on such other's land, below the spring, at the closest practicable point, and conducted the waters through the ditch to his own land for irrigation purposes, claiming the right to the waters under a posted notice, and during which times the adjoining owners might have maintained an action for the unlawful invasion of their property.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered April 16, 1914, upon findings in favor of the defendants, in an action to quiet title, tried to the court. Reversed.

Wende & Taylor, for appellant.

Englehart & Rigg and *Linn & Boyle*, for respondents.

MAIN, J.—The purpose of this action was to quiet title which it was claimed had been acquired by prescription to

¹Reported in 150 Pac. 420.

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the right of way for an irrigation ditch and the waters of a spring which flowed into the ditch. After the issues were framed, the cause was tried to the court sitting without a jury. A judgment was entered quieting the title to the right of way for the ditch, and a strip of land ten feet wide on either side of the center line thereof, but denying the right of the plaintiff to have the title to the spring quieted in himself. From this judgment, the plaintiff prosecutes the appeal.

The facts are substantially as follows: The appellant is the owner of the southeast $\frac{1}{4}$ of the southeast $\frac{1}{4}$ of section 26, twp. 11 N., R. 23 E. W. M. The respondents are the owners of the northeast $\frac{1}{4}$ of the southeast $\frac{1}{4}$ of section 26, and the northwest $\frac{1}{4}$ of the southwest $\frac{1}{4}$ of section 25, in the same township and range. The appellant's land consists of approximately 40 acres, is arid, and is not adapted to profitable farming without irrigation. On the northwest $\frac{1}{4}$ of the southwest $\frac{1}{4}$ of section 25, there is a water course which flows in a southwesterly direction, crossing the land owned by the appellant. This water course is fed by a spring, and intermittently by rains and the melting of snow. The spring is located in a canyon on the northwest quarter of the southwest quarter of section 25. The walls of the canyon are from 12 to 15 feet in height. The spring flows continuously throughout the year.

During the year 1891, the appellant filed a claim to the waters of the spring and the right to conduct the same through an irrigation ditch. Notice of this claim was posted at the spring. During the year 1892, the appellant constructed an irrigation ditch for the purpose of carrying all waters from this spring to his land, there to be used for irrigation purposes. Across the canyon, at about 250 feet below the spring, a dam was constructed. At this dam, was the intake for the ditch. The ditch extended in a southwesterly direction and ended upon the appellant's land. The dam and

intake were constructed at the closest practicable point to the spring.

During the farming season of 1892, and every year thereafter, the appellant has taken the water of the creek into the ditch at the intake to the full amount of the flow of the ditch, and has conducted the water thence through the ditch by gravity to and upon his land for irrigation purposes; and in the year 1892, and every year thereafter, he has irrigated and grown to maturity crops of hay, fruits, etc. To facilitate the unobstructed flow of the stream between the spring and the intake, the appellant each and every year has removed from the stream sage brush and willows which would accumulate there, and other obstructions.

The trial court found that the appellant, by adverse user, had acquired the right to divert all waters which came down the water course to his intake, and had acquired an easement for his ditch upon the land it covers, and ten feet on either side of the center line thereof, but that the appellant had acquired no easement in that part of the creek above his intake, or upon any of the lands above the intake, and that the appellant had acquired no prescriptive right to the use of the water of the spring for the irrigation of his lands, save and except as to the water which might reach the intake of his ditch. The respondents filed no exceptions to the findings and conclusions of the trial court. The facts, however, are not in dispute in any material respect.

The question presented upon this appeal is whether the appellant acquired the right to the waters of the spring, as well as the right to take from the water course all water which came to his dam and intake. The right, if it existed, had been acquired by adverse user. It is a recognized doctrine that rights to the use of flowing waters may be acquired by prescription. *Mason v. Yearwood*, 58 Wash. 276, 108 Pac. 608, 30 L. R. A. (N. S.) 1158; *Farwell v. Brisson*, 66 Wash. 305, 119 Pac. 814; *Sander v. Bull*, 76 Wash. 1, 135 Pac. 489. The extent of the right which may be acquired to waters by

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adverse user is determined from the nature and character of the adverse user on which it is founded. *Wutchumna Water Co. v. Ragle*, 148 Cal. 759, 84 Pac. 162. Where the right has been acquired by prescription, it results in vesting title in the claimant to the same extent as if the right had been conveyed by deed. In 2 Kinney, Irrigation and Water Rights (2d ed.), § 1057, it is said:

"The effect of a right acquired by prescription is to vest in the claimant the title to the same as completely as if conveyed to him by deed from the original owner. And, as stated in a previous section, there is a fiction of law indulged in that he acquired his title in this manner. In other words, there is a presumption that the original owner granted the right to the claimant. . . ."

From the facts stated, it appears that the appellant is a lower owner. In other words, that the water flows to his land by gravity. The general rule is that a lower owner cannot acquire title to water by adverse user. 1 Weil, Water Rights (3d ed.), § 588, p. 637; *Allen v. Roseberg*, 70 Wash. 422, 126 Pac. 900. This general rule is founded upon the fact, which is generally present, that a lower use cannot be adverse. In order that title to waters may be acquired by adverse user, it is necessary that, during the entire statutory period, there shall have been an infringement upon another's right to such an extent that such other would have had a cause of action against the claimant. *Davis v. Chamberlain*, 51 Ore. 304, 98 Pac. 154; *Perry v. Calkins*, 159 Cal. 175, 113 Pac. 136; *Ison v. Sturgill*, 57 Ore. 109, 109 Pac. 579, 110 Pac. 535; *Smith v. Duff*, 39 Mont. 374, 102 Pac. 981, 133 Am. St. 582.

Applying these rules to the facts in this case, we are of the opinion that the appellant acquired title to the waters of the spring. The purpose of constructing the ditch, dam, and intake was not primarily for the purpose of taking such waters as might come down the water course, but for the purpose of acquiring the waters of the spring. The intake was placed

a short distance below the spring at the closest practicable point. At all times after the construction of the ditch and before the right of the appellant had been acquired by prescription, the respondents and their predecessors in interest could have maintained an action against the appellant for unlawfully invading their property, and have prevented the use of the ditch. If the respondents can now by any means divert the water between the spring and the intake, the appellant's dam and ditch would become practically useless. The appellant at all times claimed the water from the spring, and his purpose was to acquire a right thereto. While the notice which he filed and posted was not sufficient in law to give him a right to the waters, it yet is material as showing the extent of the right which he claimed. *Gardner v. Wright*, 49 Ore. 609, 91 Pac. 286.

The right which is acquired by adverse use of the water of a stream is measured by the extent to which the claim was asserted and maintained. In other words, no greater right will be acquired than that which flows from both the use and the claim. 2 Farnham, Waters, § 542. Had the appellant's rights been founded upon a deed to take the waters from the stream at the point at which his intake was placed, it will hardly be doubted that he would have acquired the right to the waters of the spring. That the use of a lower owner may be adverse to that of an upper, and thus be the foundation for the acquisition of a right by prescription, is recognized in *Allen v. Roseberg*, *supra*, where it is said:

"The respondent contends that there can be no adverse use by a lower proprietor as against those above, since the use below is no interference with, and hence no possible invasion of the rights of the upper owner; citing Weil on Water Rights (8d ed.), p. 635, and other authorities. It is no doubt true that a lower use is, as a general rule, in its very nature not adverse. But this rule is applicable in its full sense only as between upper and lower riparian proprietors, and only where the lower use does not interfere with the upper. . . ."

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In sustaining the appellant's right to the waters from the spring, it has not been necessary in this case to go as far as in the case of *Mason v. Yearwood*, *supra*. To deny the appellant the right to the waters of the spring in this case would require the overruling of that case. The judgment is reversed, and the cause remanded with direction to enter judgment in favor of the appellant.

MORRIS, C. J., ELLIS, FULLERTON, and CROW, JJ., concur.

[No. 12434. Department Two. July 20, 1915.]

HERBERT D. JORGENSEN, by his *Guardian Ad Litem etc.*,
Appellant, v. CHARLES C. CRANE, *Respondent*.¹

NEGLECT — APPLIANCES DANGEROUS TO CHILDREN — EVIDENCE — SUFFICIENCY. An ordinary two wheeled scraper, with a tongue similar to a wagon tongue, somewhat cumbersome and difficult to control, is an appliance dangerous to children, and it is negligence for a contractor to leave the same upon school grounds of a minor grade school while school was regularly held, unfastened and unguarded so that it could be hauled around by children of tender years.

Appeal from a judgment of the superior court for King county, French, J., entered June 24, 1914, upon findings in favor of the defendant, dismissing an action for personal injuries sustained by a minor while playing with a scraper, after a trial to the court without a jury. Reversed.

Green & Chester, for appellant.

Palmer & Askren, for respondent.

FULLERTON, J.—In October, 1912, the respondent, Crane, acting under a contract entered into with the proper authorities of School District No. 1, in King county, graded the school grounds surrounding the buildings known as the Ravenna school. In the performance of the work, he used, in

¹Reported in 150 Pac. 419.

moving earth from one part of the grounds to another, implements commonly known as wheeled scrapers. Roughly described, these were ordinary scrapers swung under two-wheeled trucks, the trucks having a tongue similar to an ordinary wagon tongue.

The Ravenna school was a school for the minor grades, and school was regularly held therein during the progress of the work of grading. About the middle of October, the contractor temporarily suspended work, leaving one of his wheeled scrapers on the school grounds without locking or fastening it in any manner, and in such a condition that it could be hauled about over the school grounds and played with by the pupils in attendance on the school. On one part of the school grounds was a somewhat sharp incline, and in playing with the scraper the children would haul it to the top of this incline, when as many as could would get into the scraper pan, others would take charge of the tongue, and still others push the scraper down the incline. In one of such trips, the plaintiff, who was then six and a half years old, attempted to "hop" into the pan between the wheels after the scraper was put in motion. But just as he had started, the children holding up the tongue dropped it to the ground, which caused the scraper to swerve from its course, strike and throw the plaintiff down in front of one of the scraper wheels, which passed over his thigh, causing him severe and painful injuries.

This action was brought by the plaintiff, through his father as his guardian *ad litem*, to recover in damages for the injuries suffered. The cause was tried by the court sitting without a jury. At the conclusion of the plaintiff's testimony, the defendant moved for a dismissal on the ground that no cause of action had been proven. This motion the trial court granted, entering a judgment of dismissal, from which this appeal is prosecuted.

We are of the opinion that the trial judge reached an erroneous conclusion as to the legal effect of the facts proven.

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If the wheeled scraper was an appliance with which it was dangerous for children of such tender years as were in attendance on this school to play in the manner in which they did play with it, and the respondent knew, or as a reasonable person ought to have known, that they would so play with it when he left it upon the school grounds, then it was negligence on his part to leave the scraper on the school grounds in an unfastened and unguarded condition, and he is responsible in damages for any injury to any such child caused thereby. *Illwaco R. & Nav. Co. v. Hedrick*, 1 Wash. 446, 25 Pac. 335, 22 Am. St. 163; *McAllister v. Seattle Brewing & Malting Co.*, 44 Wash. 179, 87 Pac. 68; *Haynes v. Seattle*, 69 Wash. 419, 125 Pac. 147; *Bjork v. Tacoma*, 76 Wash. 225, 135 Pac. 1005, 48 L. R. A. (N. S.) 331; *Kelley v. Parker-Washington Co.*, 107 Mo. App. 490, 81 S. W. 631.

It seems to us that the evidence requires an affirmative finding on both of these propositions. That the children would haul it about and play with it in the manner in which they did play with it there can be no room for two opinions. Any one at all acquainted with the disposition of children could foresee this, and the respondent, as a reasonably prudent person, must be held in law to have foreseen it.

The other branch of the proposition, while presenting more room for difference, seems to us also to be reasonably conclusive. It must be remembered that this was a school for the minor grades, attended by many pupils who were of but tender years, and who were without that observation and experience which in more mature years teaches care and caution. The implement was heavy and cumbersome, requiring considerable power to put it in motion, and was not easily controlled when put in motion. Contact with it when in motion was most certain to produce an injury, and we think it not too much to say that a reasonably prudent person ought to have known that, if it was left for children to play with in the manner in which these children played with it, an accident to one or more of them was reasonably certain to happen.

Indeed, to our minds, the strange part is not that the plaintiff was injured, but is that no others of the children playing with the implement were injured. These conclusions require the reversal of the judgment entered and the remanding of the cause for a new trial. It will be so ordered.

ELLIS, CROW, and MAIN, JJ., concur.

[No. 12532. Department One. July 20, 1915.]

THE CITY OF EVERETT, *Respondent*, v. CHARLIE SIMMONS,
Appellant.¹

GAMING—CRIMINAL PROSECUTION—ELECTION — INSTRUCTIONS — ISSUES NOT PRESENTED. Under a general information charging gambling, which admitted of proof of guilt either as owner, employee, or one who played in the game, proof of the accused's direct personal participation in the game in a building leased by him is in the nature of an election; and upon the defense of an alibi, it is error to instruct the jury that they may convict if the accused did conduct or carry on the game "by himself or through any other person;" since there was no issue presented as to the accused's constructive participation and no opportunity to meet such charge.

SAME — CRIMINAL PROSECUTIONS — EVIDENCE — SUFFICIENCY. Evidence of a witness that he played poker in defendant's pool room but did not remember seeing defendant present at the time, is insufficient to support a conviction of gambling; as it is as consistent with innocence as guilt.

CRIMINAL LAW — TRIAL — ARGUMENTATIVE INSTRUCTIONS. Upon a prosecution for gambling, supported by evidence of hired detectives, a requested instruction is properly refused as argumentative, where it directs greater care by the jury in weighing the testimony of persons who are interested because of the natural and unavoidable tendency and bias of mind of such persons to construe everything against the accused and disregard everything not supporting their preconceived opinions.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered July 14, 1914, upon a trial

¹Reported in 150 Pac. 414.

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and conviction of violating an ordinance relating to gambling. Reversed.

Coleman & Fogarty, for appellant.

Jesse H. Davis, for respondent.

CHADWICK, J.—Appellant was convicted of violating the provisions of an ordinance of the city of Everett proscribing gambling games. The charging part of the complaint is as follows: That appellant

“did conduct, deal, play, and carry on a certain game of chance, to wit: poker, the same having been played and operated for checks and chips, then and there being representative of value, to wit: representatives of money, whereby money and other things of value were won and lost, and that said game was played, carried on and conducted in that certain building known as Simmons’ Pool Room, &c &c contrary to the form, force and effect of section 1 of Ordinance No. 14 of the City of Everett, &c &c and against the peace and dignity of said city.”

It will be seen that the city might have offered proof that appellant was either an owner or proprietor, employee, or one who played in the game. The form of the pleading in these cases has been held to be immaterial. The fact is the material thing. *State v. Preston*, 49 Wash. 298, 95 Pac. 82; *State v. Burns*, 54 Wash. 113, 102 Pac. 886; *State v. Gaasch*, 56 Wash. 381, 105 Pac. 817; *State v. Smith*, 58 Wash. 235, 108 Pac. 618.

The testimony offered on the part of the city was that defendant held the building, in which he conducted a cigar store and pool room with two card rooms partitioned out of the main room, under a written lease. A witness, Rosenthal, testified that he played poker in the place on the day alleged in the complaint, although the time fixed by him does not tally with the time fixed by the principal witnesses, who also say they saw him there and participated in a game with him. Rosenthal says he does not remember to have seen appellant

there at the time. Two witnesses, detectives employed for the purpose of obtaining evidence, testified that one of them sat in a game of poker from about six o'clock in the evening until about nine o'clock; that appellant was the dealer and banker, and, but for a time between eight and nine o'clock, was there all the time conducting the game in person.

The testimony of appellant—and he was sustained in greater or less degree by at least four other witnesses—was that, after going to his place of business about eleven or eleven-thirty o'clock in the forenoon and spending some time there, he left with two others on the two o'clock car for a suburb about four miles distant; that he returned at five-fifteen or five-twenty, a little beyond the time he was accustomed to have his Sunday dinner; that after dinner he and his wife, his brother-in-law, who had been with him all day, a young lady, who was a friend of the family, and two boys, who were guests for dinner but had gone from Everett at the time of the trial and could not be called as witnesses, spent some little time about the house; that about eight o'clock they all walked down to the business part of the town, where they left the two guests, and the four remaining went to the Orpheum theatre; that the "show" lasted until about nine-thirty; that the four then went to the corner of Hewitt avenue and Rockafeller street, from whence Mrs. Simmons and the young lady went home and appellant and his brother-in-law went to appellant's place of business. Appellant testified that he was never at his place of business at the times fixed on Sunday evenings—the gambling is alleged to have occurred on Sunday—that it was his invariable custom to spend Sunday evening with his wife, at home or at a play. There is no testimony tending to show that a game was going on after nine or nine-thirty o'clock in the evening. It will thus be seen that there was a clear-cut issue of fact.

The court instructed the jury generally, among other things, saying:

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"You are instructed that if you find from the evidence, beyond a reasonable doubt, as such degree of proof is hereinafter defined to you, that the defendant, Charlie Simmons, did, on the 22nd day of March, 1914, in that certain building known as Simmons' Pool Room and located at No. 2009 Hewitt avenue, in the city of Everett, Snohomish county, Washington, *play, or did conduct and carry on, by himself or through any other person*, a game of cards commonly known as poker, and that said game was played for checks or chips, and that said checks or chips were representatives of value, to wit: representatives of money, and that money or other things of value were won and lost in said game, then you must find the defendant guilty."

We have italicized the parts of this instruction upon which error is predicated.

It was evidently the theory of the trial judge that, although the jury might have a reasonable doubt as to whether defendant was present at the time and place testified to by the detectives, it could nevertheless convict if it found that the offense had been committed by any one acting for appellant, although in his absence.

Counsel for the city relies upon the *Preston* case and the *Gaasch* case. These cases do not touch the issue. Each of them go only to the sufficiency of the information. It is the contention of counsel that, inasmuch as the information charged appellant with *conducting* a game, proof of a game conducted by another under his authority would satisfy the law. We can agree with this, but it is fundamental that proofs must conform to the pleadings.

This court has been liberal in construing complaints in this class of cases. It has permitted the prosecutor to plead everything, and submit proof of any one or all of the things proscribed by the statute, but has never held, nor do we know of any court having ever held, where the state has made a case under one condition of the law, that it can ask a conviction upon another condition, there being no facts to sustain it.

The law does not make the facts of a case. The facts make, or rather invite, the application of some principle of law or an exception to such principle. Having authority to plead generally and prove a specific manner of commission, proof by the city of a direct personal participation in the game was in the nature of an election, and bound it to follow the law applicable to the facts by it submitted. If it were to be held otherwise, it is clear that appellant would be deprived of his defense entirely, and further deprived of an opportunity to meet the charge of constructive participation, an issue upon which he offered no proof whatever and upon which he may have been convicted. Indeed, if he had attempted to meet the charge of conducting the game by the hand of another, under the state of the record, it would have been properly rejected as not responsive.

Men are presumed to be innocent until proven guilty beyond a reasonable doubt, and it may be—in considering the law we are bound to indulge the presumption—had the facts brought appellant within the rule of a constructive violation of the ordinance, that he might have offered testimony to meet the charge. As for instance, that he had no guilty knowledge of the game, that it was carried on in his absence and against his will and direction, and that he had no interest in its results, or that there was in fact no game carried on at all.

While a party may be guilty of the offense charged without direct participation, he cannot be convicted unless the facts warrant the verdict. In the case at bar, the issue is whether the two detectives, or appellant and his witnesses, are telling the truth, for under the city's theory, as developed by its own testimony, appellant cannot be held unless he was there participating. He was there or he was not there. That is all there is to this case under the record that is before us. The testimony of Rosenthal is not sufficient of itself to sustain a conviction. The story he tells is as consistent with innocence as with guilt.

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In the case of *State v. Gifford*, 19 Wash. 464, 53 Pac. 709, the court had under consideration a statute changing the rule of the common law as to accessories before the fact, and providing that all such accessories should be thereafter held to be principals and tried and punished as such. It was contended under the statute, now Rem. & Bal. Code, § 2007 (P. C. 135 § 897), that the information was sufficient to sustain a conviction on proof that defendant contributed to the crime as an accessory before the fact, although he had not been charged other than as a principal offender. The facts had not been set out. In the case at bar, under the rule of this court as announced in the cases hereinbefore cited, the state is not required to charge any one of the several possible ways of committing the crime of gambling; but it did not intend to hold, nor does it follow, that a defendant can be found guilty under a general charge unless there be facts upon which to rest the verdict. In this connection we think that the observations of Judge Dunbar in the case cited are pertinent:

“But we do not think it was the intention of the legislature, in the passage of this law, to set a trap for the feet of defendants.”

So in this case, we do not think it was the intention of this court in so holding to set a trap for the feet of one charged under a complaint that will admit of an election to prove any one of several ways in which the crime may have been committed. The law of constructive guilt is not in this case, and the instruction should not have been given.

Appellant requested the following instruction:

“The court further instructs the jury that in weighing the testimony greater care should be used by the jury in relation to the testimony of persons who are interested in, or employed to find, evidence against the accused than in other cases, because of the natural and unavoidable tendency and bias of the mind of such persons to construe everything as evidence against the accused, and disregard everything which

does not tend to support their preconceived opinions of the matter in which they are engaged."

The instruction is argumentative and was properly refused under the authority of *State v. Miller*, 72 Wash. 174, 130 Pac. 356.

It is urged that the evidence is not sufficient to sustain a conviction. The record is short and we have read all of it. If a jury believes the testimony of the city's witnesses, the defendant should be convicted. If it should reject their testimony as unworthy, or are not convinced by it beyond a reasonable doubt, appellant should be acquitted.

Reversed and remanded for a new trial.

MORRIS, C. J., MOUNT, PARKER, and HOLCOMB, JJ., concur.

[No. 12590. Department One. July 20, 1915.]

JOHN C. McLACHLAN, *Respondent*, v. F. E. GORDON *et al.*,
Appellants.¹

PLEADINGS — VARIANCE — FAILURE OF PROOF — ISSUES, TRIAL AND JUDGMENT. In an action to recover money paid to an attorney through deceit and a conspiracy, submitted on the evidence taken in a similar case, it is error, upon finding that there was no deceit or fraud and that the issue presented by the complaint had not been proved, to give judgment for the plaintiff upon the theory of an excessive charge for services, paid by plaintiff when unduly prevailed upon; since an amendment without consent of either party, on failure of proof, is error, in view of Rem. & Bal. Code, § 301, providing that it shall not be deemed a variance, but a failure of proof, if the cause of action or defense is not proved in some particulars only, but in its entire scope and meaning.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered July 8, 1914, upon findings in favor of the plaintiff, in an action for fraud, tried to the court. Reversed.

Wende & Taylor, for appellants.

¹Reported in 150 Pac. 441.

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Opinion Per HOLCOMB, J.

HOLCOMB, J.—In April, 1914, there were two actions brought against defendants, one by one Monroe, and the present case, upon the same grounds, based upon representations of deceit and fraud on the part of F. E. Gordon, the husband, as an attorney at law, and of conspiracy between him and another attorney named Rankin, by which it was alleged the plaintiffs were deceived and defrauded into paying Gordon in each case a large sum of money, for the amount of which the several plaintiffs demanded damages. The allegations of deceit, fraud, and conspiracy in each cause were denied by the defendants by simple denial.

The Monroe case was brought on for trial before the superior court and a jury, and resulted in a disagreement of the jury. Afterwards it was reset for trial by a jury, and the present case was also then set for trial, to immediately follow the trial of the Monroe case. On the day appointed for trial of the Monroe case, the parties stipulated in open court, the court consenting, which stipulation was later reduced to writing and filed, whereby a jury was waived in both cases and both cases were submitted to the judge who presided at the trial of the Monroe case, for determination upon the evidence which had been presented in that case, *and the issues presented by the pleadings* in both cases.

During the trial of the Monroe case, the court permitted that plaintiff, over the objection of defendants, to introduce evidence of the transaction between this plaintiff and defendants, upon the principle that other similar transactions of a fraudulent character may be shown to establish fraud in the transaction in issue. After consideration of the cases for some time, the trial court found for the defendants upon all the issues in the Monroe case, and dismissed that action. As to the case in hand, he found and concluded that a different situation existed as to the transaction between the parties; that "the proof fails to sustain the allegation charging a conspiracy between Gordon and Rankin;" that respondent had employed appellant to represent him in a threatened suit

at law, upon the terms that \$200 should be paid Gordon as a retainer fee and for his services up to the trial of the threatened cause, and that, if a trial was had, the further sum of \$300 was to be paid; that the threatened action against respondent was never brought; that "at the solicitation of Gordon it was dropped, and any cause of action released and discharged; and that after such release and discharge from the threatened suit and cause of action therefor, respondent paid appellant the further sum of \$300." This the court found and concluded was excessive and exorbitant and beyond the contract between the parties, and paid because Gordon unduly and excessively prevailed upon respondent. The court thereupon gave judgment against appellants, as though upon a complaint amended without the assent of either party to conform to such findings, for the \$300. This constructive amendment by the court, without the consent or agreement of either party, is the chief error assigned by appellants, and the only one we consider.

Both appellants and respondent excepted to the findings and conclusions made by the trial judge of his own motion, and moved for a new trial, the motions of both appellants and respondent being denied. All of the parties to the suit apparently relied upon the issues raised by their pleadings as to fraud and conspiracy. The appellants stood trial upon the issues tendered by the respondent in his complaint, and had no opportunity to defend any other stated cause of action. Under the stipulation between the parties, the hearing, both on the law and the facts, was necessarily limited to those issues. The rule that the *allegata* and *probata* should correspond prevails under the code as well as at common law. *Marsh v. Wade*, 1 Wash. 538, 20 Pac. 578.

Our code, Rem. & Bal., § 303, provides for liberality in the way of amendments to "correct mistakes of names of parties, or mistakes in any other respect, upon such terms as may be just," with or without the consent of the adverse party; and in recent times the courts have avoided refined and tech-

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nical objections to pleadings. This court has been as liberal in that respect as the courts of last resort anywhere. We have always adhered to the principle that a court of general jurisdiction is not, in most cases, bound by the mere form of the pleading, if it states a cause of action for the relief, or any of the relief, demanded; and in case of any mere deficiency or inconsistency in the pleading, if not objected to, or if evidence, under an allegation not pleaded or not properly pleaded when the pleading is sufficient to apprise the opponent of the nature of the cause of action or defense or relief demanded, is received at the trial in the presence of the adverse party, without objection, the pleading will thereafter be deemed amended to conform to the proof.

But our code, Rem. & Bal., § 301, further provided that:

"When, however, the allegation of the cause of action or defense to which the proof is directed is not proved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance . . . but a failure of proof."

Hence, we have recently held that:

"Where a complaint is founded on an express contract of sale and the evidence discloses an express contract of consignment, there is an entire failure of proof." *Hubenthal v. Creighton*, 81 Wash. 688, 143 Pac. 98.

In *Oldfield v. Angeles Brewing & Malting Co.*, 72 Wash. 168, 129 Pac. 1098, we said:

"No leave to amend was requested. No rule of construction, however liberal, can permit the trial of an issue not tendered in the complaint over the objection of the defendant. To permit such a course would be to ignore the statute, dispense with formal pleadings, and invite endless confusion."

In this case, the respondent pleaded damages from deceit, fraud, and conspiracy, and the recovery was allowed, without amendment, on the ground of extortionate overcharging, on a sort of implied contract of the attorney to forbear or refund the sum not earned.

The cause will be remanded for a new trial, that the parties may try the case fully on such issues as they frame by their pleadings. They may amend their pleadings and tender new issues, or stand upon their present pleadings, at their election. Appellants will recover costs of appeal.

Reversed and remanded.

MORRIS, C. J., MOUNT, ELLIS, and CHADWICK, JJ., concur.

[No. 12640. Department One. July 20, 1915.]

SKAGIT STATE BANK, *Appellant*, v. S. L. MOODY,
Respondent.¹

BILLS AND NOTES—ACCOMMODATION NOTES—CONSIDERATION. Where the state bank examiner had required a bank to collect overdue interest on a note or charge the note off, and officers of the bank gave notes to take up the interest in order to satisfy the examiner, their notes must, in law, be considered as an accommodation for the makers of the note, and not for the accommodation of the bank; hence there was a sufficient lawful consideration therefor.

SAME. The indorsement of the interest on the note by the bank was a waiver of a present right of action against the maker and a sufficient consideration for the officer's notes for the overdue interest.

BILLS AND NOTES—VALIDITY—ILLEGAL PURPOSE—OTHER CONSIDERATION. An unlawful agreement that officers of a bank should give notes for the amount of overdue interest on a note held by the bank, in order to deceive the state bank examiner, without being liable to the bank, does not invalidate their notes, as between the parties, where there was a lawful consideration therefor, the sum being intended as payment of the overdue interest and indorsed on the note as such.

Appeal from a judgment of the superior court for Skagit county, Pemberton, J., entered October 31, 1913, upon the

¹Reported in 150 Pac. 425.

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Opinion Per CHADWICK, J.

verdict of a jury rendered in favor of the defendant, in an action upon a promissory note. Reversed.

Shrauger & Henderson, for appellant.

Thomas Smith, for respondent.

CHADWICK, J.—On the 11th day of April, 1910, respondent was a director of the appellant bank. Appellant held a note known as the Cain Brothers' note, or the Darrington Mill note, in the principal sum of \$8,000, upon which the interest had so long defaulted that the state bank examiner had directed that the interest be collected or the note charged off. The note had been originally taken by R. M. Moody and L. L. Moody, brother and nephew of respondent, and had been by them indorsed over to the bank without recourse. L. L. Moody was the president of appellant bank.

Seemingly in anticipation of a call from the state bank examiner, L. L. Moody, P. M. Moody, R. M. Moody, Ollie Moody, and one Fellows, a then stockholder and later cashier of the appellant, met at the home of respondent and it was decided that respondent and his brother R. M. Moody should each give a note for the sum of \$500, payable to the bank, to take up the overdue interest on the Cain Brothers' note. These notes were given, carried into the bank's bills receivable, and the amount thereof placed to the credit of the overdue interest account as a payment on the Cain Brothers' note. The payment was also indorsed thereon. The control of the bank thereafter passed out of the hands of the Moody family. The note of respondent was not paid when due.

To an ordinary complaint, respondent answered, admitting the execution of the note; and plead affirmatively, (a) that there was no consideration for the note; (b) that it was given for the accommodation of the bank and for the purpose of deceiving the bank examiner, and was therefore void; (c) that there was an express understanding that the note should

be thereafter returned to respondent; and (d) that, after the execution of the note, Fellows and one Davis bought the control of the bank and agreed and promised to return respondent's note to him. A demurrer to these affirmative defenses was overruled and the case went to trial. From a judgment entered upon a verdict in favor of respondent, this appeal is taken.

Respondent contends that, inasmuch as the Cain Brothers' note was known to be worthless at the time the note sued on was given, there was no consideration in law to sustain his promise. The question of consideration was the only question submitted to the jury by the trial court. Granting, but without holding, that respondent could set up a collateral oral agreement that he was not to be bound by his promise, it seems to us that there was a sufficient lawful consideration for the note. The position of respondent is that the note was given for the accommodation of the bank, and that one for whom an accommodation is made cannot sue directly upon the promise; that, as between the bank and respondent, the note being given to accomplish an illegal purpose, the law will leave the parties where they have placed themselves—that is, without remedy, one against the other.

While the note was given for the accommodation of the bank in a certain sense, that is to say, its consequence was to save the bank from the aspersions of the agent of the state and a possible finding of insolvency, it was, nevertheless, and in law entirely so, given for the accommodation of the Cain Brothers.

An accommodation note is one given as collateral to the promise or obligation of another. It neither asserts nor implies a consideration flowing direct from the payee to the maker. The note is supported by the obligation of the principal debtor. It is the fact that the maker receives no value therefor that gives the paper its character as accommodation paper. Rem. & Bal. Code, § 3420 (P. C. 357 § 57).

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Respondent relies upon the case of *First Nat. Bank of Storm Lake v. Felt*, 100 Iowa 680, 69 N. W. 1057, and *Woodbury v. Glick*, 151 Iowa 648, 132 N. W. 67. These cases may be distinguished from the case at bar. While it was held that no recovery could be had upon notes given to cover loans to third persons made in excess of the legal limit and to thus satisfy the law and the demands of bank examiners, the bank being solvent and no rights of creditors being involved, it was nevertheless made to appear that the taking of the notes sued on was a banking transaction made by a bank otherwise solvent, with full knowledge and at the instance of the officers and directors of the bank. The transaction was in the one case expressly ratified at a directors' meeting, and in the other there was not only actual notice, but by a long continued practice which would impute notice to all concerned, whether there was actual notice or no. In the case at bar, the note was taken after a conference of what one of the witnesses admits was the "Moody family." The remaining directors testified that they had no knowledge of the transaction. One of them testifies to a seeming purpose on the part of those most heavily interested in the bank to keep the outsiders, the other directors, in ignorance of its affairs. But aside from these considerations, we are of opinion that there was a consideration for the note.

It is not denied, but admitted in terms by respondent and by the others who had knowledge of the facts, that the note was given as a present payment of the overdue interest on the Cain Brothers' note. Payment of interest was actually indorsed on the Cain note. The substitution of the note for the overdue interest was, in legal effect, a parting with a consideration by the bank. The indorsement of a payment was a waiver of a present right of action against Cain Brothers, and a sufficient consideration under all authority. The bank, or rather its officers and principal stockholders, had put themselves in "a worse position" as the books say, in so far as the

Cain Brothers' note was concerned. To illustrate, had the bank examiner actually ordered the officers to make the Cain Brothers' note good, and they had gone out and obtained respondent's note and presented it to him as a payment of the interest, the bank could not at that time, even upon his order, have sued Cain Brothers. By its own act and accommodation of respondent, it had made the paper "prime." Or, again, if, on the next day, the bank had sued on its own account, it could not repudiate the payment of the interest as an illegal transaction, without pleading the fraud of its officers and some of its stockholders, the disclosure of which would certainly have made its complaint subject to a demurrer.

Respondent seems to understand that a showing of no consideration to him moving is sufficient to satisfy the law. On the contrary, it is only where there is an absence of or failure of consideration to sustain the obligation that the defense is available. If two or more sign a note, the defense of no consideration is not available to the one who signed but who received none of the proceeds. The accommodating party is bound by the consideration moving to the other party and will not be heard to plead, as against the holder of the note, whether in the first hand or in that of an indorsee, no consideration, or even the defense of suretyship. See *Anderson v. Mitchell*, 51 Wash. 265, 98 Pac. 751; *Pitt v. Little*, 58 Wash. 355, 108 Pac. 941; *Aurora Land Co. v. Kevan*, 67 Wash. 305, 121 Pac. 469.

Finding that the payment of the interest on the Cain Brothers' note is a sufficient consideration, we have passed without opinion the question of public policy. That is, the right of the respondent to plead a fraud upon the law to defeat the terms and tenor of his obligation. *State Bank of Moore v. Forsyth*, 41 Mont. 249, 108 Pac. 914, 28 L. R. A. (N. S.) 501; *Pauly v. O'Brien*, 69 Fed. 460. In the *Forsyth* case, the court found a consideration, after a discussion of the law with several strictures upon a transaction similar to

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the one now under inquiry. In the *Pauly* case, the bank was insolvent.

However, it will not be out of place to say that the insistence of counsel for respondent at the trial that the transaction, being conceived and carried out by the parties in fraud of the law, makes the note void as between the parties, is without merit. It is only where a note is given in consideration of an illegal transaction that it is void. The transaction between respondent and the bank was a lawful thing. Respondent willingly loaned his credit to the Cain Brothers' note. He intended it as a payment of their overdue interest. There is no suggestion of fraud or deception or that he misunderstood the purpose of it. It is the relation of debtor and creditor existing between the bank and Cain Brothers, and not the illegal purpose mentally reserved by the parties, that sustains the transaction.

Courts will not lightly overturn the ordinary transactions of men, legal and binding on their face, to work out an ulterior purpose resting in parol and in fraud. Where an obligation otherwise lawful is challenged as working a collateral fraud, a court will look first for a lawful ground upon which to rest its judgment, rather than look for an excuse to overturn it. Respondent's obligation is *prima facie* binding. His act was voluntary. He knew its purpose and that it was accomplished. He will be held to his promise.

Reversed and remanded with directions to enter judgment in accordance with this opinion.

MORRIS, C. J., PARKER, MOUNT, and MAIN, JJ., concur.

[No. 12713. Department One. July 20, 1915.]

HAL H. WILLIAMS, *as Jones & Williams, Appellant*, v.
LINDENBERGER PACKING COMPANY, INCORPORATED,
Respondent.¹

DISMISSAL AND NONSUIT—FAILURE TO AMEND—ISSUES UNDETERMINED. Where the plaintiff alleged three several items of damages from breach of contract, and was ordered to make the complaint more definite and certain in one particular only, it is error, on motion to strike the amended complaint for failure to properly comply with the order, to dismiss the action, since an issue was tendered as to the other items.

APPEAL—ORDERS REVIEWABLE—DEMURRER—FINAL ORDERS. Where a motion to strike an amended complaint alleging three several items of damages from breach of contract was treated and argued as a demurrer to one of the items only, the supreme court will not review the judgment thereon, so long as any issue tendered has not been disposed of on the merits.

DISMISSAL AND NONSUIT—FAILURE TO AMEND—ISSUES. Where a motion to strike an amended complaint alleging two several items of damage was treated as a demurrer to one of the items, failure to plead over does not subject the plaintiff to a dismissal, as for contumacy in refusing to comply with the order to strike; since he was entitled to go to trial on the remaining items.

APPEAL—DECISIONS APPEALABLE—AMOUNT IN CONTROVERSY. An appeal from a judgment dismissing an action, for contumacy in failing to comply with an order to strike one item of the complaint, will not be dismissed as involving only costs and less than \$200, where there was real error, in that other parts of the complaint tendering an issue were improperly disposed of.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 20, 1915, dismissing an action on contract, upon granting a motion to strike the amended complaint. Reversed.

Winfield R. Smith, for appellant.

Jones & Riddell, for respondent.

¹Reported in 150 Pac. 432.

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Opinion Per CHADWICK, J.

CHADWICK, J.—Plaintiff begun this action, alleging three several items of damages growing out of an alleged breach of contract. Defendant moved to strike certain parts of the complaint as irrelevant and immaterial and as too indefinite to be sustained by proof, and also moved to make the complaint more definite and certain in enumerated particulars.

The motion to make more definite and certain came on for hearing, and the court ruled that “the motion to make more definite and certain is granted as to the sixth paragraph and denied as to the remainder.” Plaintiff thereafter amended. In the amended complaint, paragraphs five and six are made as one and numbered five. Defendants moved to strike the amended complaint upon the ground that the matters set forth in paragraph five of the amended complaint were the same matters contained in paragraph six of the original complaint, and that they had been so pleaded in open defiance of the order of the court. The matter coming on for hearing, the court sustained the motion, and plaintiff refusing to plead further, the court entered a judgment in which it is recited that, whereas,

“The plaintiff reserved an exception to the order of the court and took leave to amend his complaint, and since said time has served an amended complaint in which amended complaint the plaintiff inserts as a part of paragraph five of said amended complaint the matters set forth and stricken from paragraph six of the original complaint, which were originally stricken by this court from the original complaint; and it fully appearing to this court from the pleadings and the argument of counsel for the plaintiff that such amendment to the original complaint was made in contempt of the order and ruling of this court as heretofore made striking paragraph six of the original complaint, to which ruling of this court objection was made and exception reserved. Now then, this court duly finds that such amended complaint was served and filed for the express purpose of stating therein among other things, the matters which had been originally stricken from the original complaint and is contumacious. Therefore, the motion to strike such amended complaint is hereby granted.

"It is further ordered, adjudged and decreed that this action be dismissed and the defendant Lindenberg Packing Company Inc., recover of the plaintiff its costs and disbursements herein to be regularly taxed as provided by law."

Plaintiff has appealed to this court and has set up three several matters for our consideration. First: That his conduct was not contumacious; second, that, if so, the court had no jurisdiction to dismiss the complaint and thus penalize a litigant in a civil action because of the contumacy of his counsel; and third, that the matter stricken was properly pleaded and is a statement of a just cause of action.

We are not disposed to follow counsel in his discussion of the law of contempt and the question of the court's power to dismiss an action because of the contumacy of counsel, nor will we go into the merit of the stricken allegation. In any event, the court should not have dismissed the action. A motion directed against two of the items of damages had been previously overruled. They were still before the court and had not been attacked by demurrer. They tendered an issue had the defendant cared to deny them in law or in fact. Whatever this court might hold upon final appeal as to the relevancy and materiality of paragraph six, it is enough to say that this is not a court of first instance. We do not settle pleadings, and we will not review the judgment or discretion of the trial court upon an appeal from a motion to dismiss as it were upon a refusal to plead over after a demurrer—the motion to strike is treated and argued as a demurrer—so long as any issue is tendered and has not been by the trial court disposed of upon its merits.

This case will be remanded with instructions, in the event that appellant does not see fit to amend so as to meet the views of the trial judge, to frame an issue of law or fact upon the remaining allegations of causes of action and render a judgment upon the merits.

We have considered the motion as a demurrer, and the situation of appellant as one who has refused to plead over

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after a demurrer has been sustained. As before said, the parties have treated the motion as such, and the court struck the matter alleged to be indefinitely pleaded on the theory that it did not state a cause of action. In passing, we believe it is not out of place to say that the issue sought to be raised by respondent should have been raised by demurrer rather than by motion. We think appellant should have met the views of the trial judge, allowed the matter to be stricken, and gone to trial upon the remaining items of damage, contenting himself to raise the question of the sufficiency of his pleading on appeal.

The parties will pay their own costs in this court.

Respondent has moved to dismiss the appeal because the amount involved is no more than the costs, and that these are less than \$200. If this were all, there might be merit in the motion, but there being real error, in that parts of the complaint held good have been improperly disposed of, we think the merit of the case is so far involved as to compel us to overrule the motion.

Remanded.

MORRIS, C. J., MOUNT, PARKER, and HOLCOMB, JJ., concur.

[No. 12825. Department One. July 20, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. WALTER SCOTT,
Appellant.¹

LARCENY—CORPUS DELICTI—EVIDENCE—SUFFICIENCY. In a prosecution for the theft of money belonging to C., the *corpus delicti* is sufficiently shown by proof that the money was in the trunk where C. had placed it that morning, that it was not there at noon and had been removed by some person other than C.

SAME—EVIDENCE—SUFFICIENCY. Where the theft of money belonging to C., who had left the state, is established by the testimony of other witnesses that C. and detectives had opened and searched the trunk in which the money had been placed, and failed to find it, proof that C. had made "complaint" or accused any particular person is not essential.

SAME—EVIDENCE—SUFFICIENCY — CONFESSIONS — CORPUS DELICTI. Upon a prosecution for the theft of \$480 that was kept in a trunk, the fact that, when the defendant was arrested on the same day in another city, he had \$67.50 and some articles that had been in the trunk that morning, and that defendant told the officer that he took only \$50, but did not get it from the trunk, but from a dresser, is admissible and sufficient to make a case for the jury; a defendant's confession, along with other evidence, being admissible to establish the *corpus delicti*.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 24, 1914, upon a trial and conviction of grand larceny. Affirmed.

John F. Dore and *Robert Welch*, for appellant.

Alfred H. Lundin, *E. J. Wright*, and *Joseph A. Barto*, for respondent.

HOLCOMB, J.—Appellant was tried and convicted of the crime of grand larceny, upon an information charging him as follows:

"He, the said Walter Scott, in the county of King, state of Washington, on the 30th day of May, 1914, \$480 in money, of the value of \$480 lawful money of the United States, the

¹Reported in 150 Pac. 423.

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property of one Effie Carter, did then and there wilfully, unlawfully, and feloniously, take, steal and carry away, with intent to deprive and defraud said Effie Carter thereof."

There are five assignments of error:

I. The first claim of error goes to the sufficiency of the evidence of the prosecution to make a *prima facie* case to be submitted to the jury. This includes a claim of fatal variance, amounting to total failure of proof, between the allegations of the information and the state's proofs.

The state showed that Effie Carter and one Edna Penn lived together at the time of the alleged larceny; that Effie Carter was a dressmaker, and on the date alleged had the sum of over \$400 in paper money, gold and silver of the United States in a money case; that Edna Penn had \$120 in a pocket book; that they kept the money in Effie Carter's trunk, of which Effie Carter kept the key; that they saw their money in the trunk about eight-thirty or nine o'clock in the forenoon; that Edna Penn left the place shortly thereafter; that appellant was there that morning when she left, and had been every morning for about a week for the purpose of making the fire, cleaning the place, and going errands; that Edna Penn returned about noon and there were Miss Carter, two detectives and a Japanese, who had just pried the lock off the trunk and opened it; that the money was gone, and also the Carter woman's money case, and a knife that had been in the trunk; that later, in the evening of the same day, the trunk key was found on the top of a shelf where it had not been the Carter woman's habit to keep it. It was shown that the appellant left Seattle, where the alleged larceny occurred, on that day, and was arrested in Everett between four and five o'clock in the afternoon that day; that at the time of his capture he had in his possession the sum of \$67.50 in money, the purse of Effie Carter, which had contained her money in the morning, and the knife, which was the property of Edna Penn.

Appellant contends that this showing did not prove *prima facie* that any money of Effie Carter's had been taken by him, any more than it proved the taking of the money belonging to Edna Penn, with which he was not charged, and that mere proof of his possession of \$67.50 in money proved no fact constituting the larceny. Ancillary to this claim, appellant also claims that the *corpus delicti* was not shown. As to the *corpus delicti*, it was manifestly shown that the property of Effie Carter was where she had placed it in the morning; that it was not there at noon; that some one other than herself had removed it from the place where it was kept. Thus, the asportation, or fact which formed the basis of the criminal act, was shown; next, that some person wrongfully brought about that fact. These are the only things essential to constitute the *corpus delicti* of a theft.

Effie Carter left the county and state before the trial and was not present to testify. These principal facts were testified to only by Edna Penn. From this circumstance, appellant argues that "there is no evidence whatsoever as to what disposition Effie Carter, the owner of part of the property enumerated and bailee of the property of Edna Penn, found in the possession of appellant, made of it or any part of it, or that Effie Carter ever complained of any theft of her money or property." This was not necessary. Edna Penn testified to the material facts, so far as missing the property was concerned, so far as any one who was not an eye-witness to the taking could. It was not necessary for any one to "complain" or accuse any particular person. When Edna Penn returned to the room at noon, she found Effie Carter there with detectives and the Japanese who had just forced open the trunk, and making search for the property. She saw Miss Carter search the trunk for the money and fail to find it. The facts were partly circumstantial and were for the jury. *State v. Wong Quong*, 27 Wash. 93, 67 Pac. 355.

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II. When arrested, as heretofore stated, appellant had in his possession \$67.50 and some articles which had been in the trunk in the morning. The same day an officer had a conversation with appellant, who said that he only took \$50, and that he did not get that out of the trunk, but out of a box on a dresser. No explanation was made to the officer, nor to the court and jury by appellant of his possession of the purse and knife. Appellant contends that the admission contained in this conversation with the officer was erroneously admitted, inasmuch, according to appellant, as the *corpus delicti* had not been shown.

It is well settled that the confession of a defendant, along with other circumstances in the case, can be shown to establish the *corpus delicti*. *Nicks v. State*, 40 Tex. Cr. 1, 48 S. W. 186; *Atkins v. State*, 44 Tex. Cr. 291, 70 S. W. 744; *People v. Davis*, 19 N. Y. Supp. 781; 1 Wharton, Criminal Law (11th ed.), pp. 458, 459. The facts and circumstances shown at the trial pointed unerringly to the guilt of the defendant, and most certainly made a case for the jury.

III. Some other claims of error are made as to the admission of certain articles in evidence that were taken from the trunk and found in the possession of appellant, but we find no merit in them. Our observations, in effect, cover all the contentions of appellant. We find no error.

Judgment affirmed.

MORRIS, C. J., CHADWICK, MOUNT, and PARKER, JJ., concur.

[No. 12003. Department One. July 20, 1915.]

CONTINENTAL DISTRIBUTING COMPANY, *Respondent*, v.
J. W. HAYS *et al.*, *Appellants*.¹

EXECUTION—SALES—TITLE—SALE UNDER JUNIOR EXECUTION. Sales of personal property under a junior execution will convey good title, and the proceeds under a junior writ must be applied to the satisfaction of a senior writ.

SHERIFFS AND CONSTABLES—LIABILITY—SALE UNDER JUNIOR EXECUTION. Under Rem. & Bal. Code, § 515, making it the duty of the sheriff to indorse upon a writ of execution the time when he received it, and Id., § 657, requiring him to execute attachments against the same defendant in the order in which they are received, the sale must be made under the senior writ to enable the senior creditor to protect his interests by a bid at his own sale; and the sheriff and his official bondsmen are liable for the value of the goods, if sale is made at a less value under a junior writ, and it is not enough that the proceeds of the sale were applied to the judgment of the senior creditor.

APPEAL—REVIEW—PARTIES ENTITLED. Appellants can take no exception to an order to apply proceeds of a sale in reduction of their liability, as it is beneficial to them.

SHERIFFS AND CONSTABLES—LIABILITY—SALE UNDER JUNIOR WRIT—MEASURE OF DAMAGES. The measure of damages to a senior attachment creditor, for the sale of personal property by a sheriff under a junior writ, is the value of the property at the time of the sale, and not the difference between the price obtained and that which could have been obtained by a sale under the senior writ.

Appeal from a judgment of the superior court for Franklin county, Grady, J., entered January 19, 1914, upon findings in favor of the plaintiff, in an action for damages, tried to the court. Affirmed.

Chas. W. Johnson, for appellants.

Driscoll & Leonard, for respondent.

Crow, J.—Defendant J. W. Hays, at the dates hereinafter mentioned, was the sheriff of Franklin county, and the

¹Reported in 150 Pac. 416.

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defendant Pacific Coast Casualty Company, a corporation, was the surety on his official bond. On March 18, 1911, the plaintiff, Continental Distributing Company, having commenced an action, No. 1386, in the superior court of Franklin county against one Dan Jones and Stella Jones, his wife, to recover \$441.10, caused an attachment to be issued and delivered to the defendant Hays, as sheriff, who on the same day levied the attachment on personal property belonging to Jones. On May 19, 1911, the Davis-Kaser Company, having commenced a second action, No. 1442, against Jones, caused an attachment to be issued and delivered to defendant Hays, who, on June 7, 1911, levied it on the identical property on which he had levied the first attachment in cause No. 1386. On July 5, 1911, judgment was recovered by the Davis-Kaser Company in cause No. 1442, against Jones and wife for \$378 and costs, and on September 5, 1911, judgment was recovered by the plaintiff, Continental Distributing Company, in cause No. 1386, for the full amount of its claim with costs.

On December 20, 1911, the Continental Distributing Company, holding the first attachment lien, caused an execution to issue in cause No. 1386, upon its judgment, and delivered the same to the sheriff with directions to sell the property theretofore attached. Two days later, the Davis-Kaser Company, holding the second attachment lien, caused an execution to be issued in cause No. 1442, upon its judgment, and delivered the same to the defendant Hays with directions to satisfy his judgment. The sheriff, over the objections of the Continental Distributing Company, proceeded to sell the property under the second execution and attachment lien in cause No. 1442, he being of the opinion that the sale could be made under either execution. The property sold for \$25 only, which, after deducting his expenses of \$2.55, the defendant sheriff paid into court for the Continental Distributing Company. The first execution, in cause No. 1386, was returned unsatisfied for the reason that all the property of

Jones had been sold under the second execution in cause No. 1442. Thereupon the Continental Distributing Company commenced this action against Hays and also against the surety company upon his official bond, to recover as damages the value of the attached property, alleged to be \$400.10. The trial court found the facts above stated, and further found the value of the attached goods to be \$100 at the date of the sale. Upon these findings, judgment was entered for the plaintiff for \$22.45, the amount realized from the sale, and for the further sum of \$77.55, making a total of \$100, the value of the property found. From this judgment, the defendants have appealed.

The questions raised by the assignments of error are, (1) whether the act of the defendant Hays, as sheriff, in selling the goods under the second execution in cause No. 1442, over the objections of respondent, the holder of the prior execution, caused the respondent to sustain any damage, and constituted a breach of his official bond for which the sheriff would be liable; and (2) assuming it to be such a breach, whether the court adopted the correct measure of damages.

A sale of personal property under a junior execution will convey good title to the purchaser. *Smallcomb v. Buckingham*, 1 Salk. 320, 1 Lord Raymond, 251; *Kilby v. Haggin*, 26 Ky. (3 J. J. Marsh.) 208; *Rogers v. Dickey*, 1 Gilman (Ill.) 636, 41 Am. Dec. 204. In *Marsh v. Lawrence*, 4 Cow. (N. Y.) 461, 468, the court said:

"It is well settled, that if two writs of *fiery facias* are delivered to the sheriff, and he sells under the junior execution, such sale cannot be avoided, and the party has no remedy but against the sheriff. The property of the goods is bound by the sale; and cannot be taken by the execution first delivered. The reason given is, 'that sales made by the sheriff ought not to be defeated; for if they were, no man would buy goods levied upon by a writ of execution.' . . . If the executions are in the hands of the same officer, the plaintiff in the first execution has a perfect remedy against him; for it is his duty to sell on the first; and if he does not, he is answerable."

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The rule seems to be that the proceeds of a sale of personalty made under a junior writ must be applied to the satisfaction of the senior writ. 2 Freeman, Executions (8d ed.), § 196; *Love v. Williams*, 4 Fla. 126; *Rogers v. Edmunds*, 6 N. H. 70.

It has been stated *arguendo* in a number of the cases above cited that the officer making a sale under a junior execution will be liable to the holder of the senior execution for any damage done him by such sale, and this doctrine seems to have been generally accepted. We have been unable, however, to find any case in which the liability of a sheriff for making a sale under a junior execution was the issue directly involved. In all the cases cited, the actions were for the recovery of the property sold or for an application of the proceeds of the sale. 25 Am. & Eng. Ency. Law (2d ed.), 682; *Marsh v. Lawrence*, *supra*; *Arberry v. Noland*, 25 Ky. (2 J. J. Marsh.) 421; *Grabenheimer v. Budd*, 40 La. Ann. 107, 3 South. 724.

Section 515, Rem. & Bal. Code, makes it the duty of the sheriff to "indorse upon the writ of execution the time when he received the same." In *Ohlson v. Pierce*, 55 Wis. 205, 12 N. W. 429, where a similar statute was under consideration, the court said:

"The statute requires that, 'upon the receipt of any execution, the sheriff or other officer shall indorse thereon the year, month, day, and hour of the day, when he received the same.' Section 2972, R. S. The only possible object of this statute is, that the officer shall proceed to levy executions in the precise order of time in which they are so received and indorsed, and to confer upon an execution plaintiff a priority of right to such levy, and therefore a prior lien upon the property of the execution defendant; for by another statute his personal property is not bound until seized under execution."

It would seem that an execution sale should be made under the writ entitled to priority. Otherwise the holder of the prior execution might be deprived of his right to purchase the property at his own sale for a fair value in satisfaction

of his judgment; that is, he might be unable to procure a sale for its full value under the second execution, over which he would have no control; and this is exactly what seems to have happened in the instant case, to the prejudice and damage of respondent. One object in giving priority to the writ first delivered is to secure the senior creditor. The levy clearly contemplates a sale of the property under the first writ with the privilege to the execution creditor to bid at his own sale, thus protecting his interests. Rem. & Bal. Code, § 657 (P. C. 81 § 433), requires the sheriff to execute the attachments against the same defendant in the order in which they are received. The plaintiff's prior attachment, under which the property was held, was never dissolved. It was levied to secure the property of the defendant for the satisfaction of any judgment that respondent might recover. Rem. & Bal. Code, § 647 (P. C. 81 § 413). A subsequent attachment or execution should not interfere with that right, and any act of the sheriff causing such an interference would render him liable for damages suffered. It is not sufficient that the proceeds of the sale were applied to the judgment of the senior creditor, as he had an absolute right to a sale under his prior execution, in order that he might protect himself, and the sheriff is liable for any interference with that right.

The measure of damages found by the trial court was the value of the goods at the time of the sale. To reduce appellants' liability for the value thus found, the trial judge ordered the proceeds of the sale to be paid to respondent. To this order, the appellants can take no exception, as it was beneficial to them. Appellants, however, contend that the proper measure of damages is the difference between the price obtained and that which could have been obtained by a sale under respondent's execution. We think the trial court adopted the correct rule. 35 Cyc. 1698.

The judgment is affirmed.

MORRIS, C. J., CHADWICK, and PARKER, JJ., concur.

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Opinion Per MAIN, J.

[No. 12573. Department Two. July 21, 1915.]

ANDREW LINDBLOM *et al.* Appellants, v. THE CITY OF
SEATTLE, Respondent.¹

MUNICIPAL CORPORATIONS—CLAIMS—PRESENTATION — PLEADING. A complaint for damages against a city showing that the claim therefor was not presented within the thirty days prescribed by the city charter, is demurrable.

SAME—CLAIMS—FILING—WAIVER. The fact that a city council considered and rejected a claim that was not filed within the time allowed by the city charter does not show a waiver of the provision relative to the presentation of claims.

SAME—CLAIMS—FILING—STATUTES—VALIDITY. The provision of a city charter requiring all claims for damages against the city to be filed with the clerk within thirty days after the time when such claims accrue, is not inoperative because of the hardship it would work if given effect.

Appeal from a judgment of the superior court for King county, Smith, J., entered September 1, 1914, upon sustaining a demurrer to the complaint, dismissing an action in tort. Affirmed.

P. P. Carroll and Charlotte F. Jones, for appellants.

MAIN, J.—The purpose of this action was to recover damages to lots 9 and 10, block 28, of Central addition to the city of Seattle, claimed to be caused by the grading of certain streets in the vicinity of these lots.

The allegations of the complaint, so far as here material, are in substance as follows: That the defendant city, in making an outlet for certain water between Holgate and Plum streets, caused the property of the plaintiffs to be flooded during the months of January, February, and March, 1909, which flooding prevented the use and occupation of the premises until the fore part of June, 1909, and caused damages to the plaintiffs in the sum of \$192; that in June,

¹Reported in 150 Pac. 422.

1909, the defendant commenced to grade 18th avenue south, and in July and August of the same year caused a fill to be made on Plum street, which compelled plaintiffs' tenants to move out of the cottages which had been erected upon the lots above described, to the plaintiffs' damage in the sum of \$2,300; that, on the 14th day of April, 1911, the plaintiffs prepared their claim against the city, and on April 17, 1911, filed the same with the comptroller thereof, which officer was *ex officio* clerk of the city; that the claim was, on the 17th day of April, referred to the streets and sewers committee of the city council, and on the 8th day of May, 1911, the claim, after being considered, was rejected. To the complaint, a demurrer was interposed, and sustained by the trial court. The plaintiffs refused to plead further and elected to stand upon their complaint. From a judgment dismissing the action, the appeal is prosecuted.

From the facts stated in the complaint, it appears that the claim was not filed for many months after the damages are alleged to have occurred. The charter of the city of Seattle, 1915, p. 37, § 29, provides:

"All claims for damages against the city must be presented to the city council and filed with the clerk within thirty days after the time when such claim for damages accrued,
. . . ."

The claim presented was not within the time fixed by this charter provision. A complaint which fails to allege that the claim was presented to the city council and filed with the clerk within the time fixed by the charter does not state a cause of action. *Ransom v. South Bend*, 76 Wash. 396, 136 Pac. 365; *Benson v. Seattle*, 78 Wash. 541, 139 Pac. 501.

But it is claimed that the allegation of the complaint that the claim was referred to the streets and sewers committee, and after considering the same was rejected, shows a waiver on the part of the city of the charter requirement. Even if the city council has the power to waive the provision of the city charter relative to the presentation of claims, a question

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Statement of Case.

which we do not now decide, the facts pleaded are not sufficient to show a waiver. *Cole v. Seattle*, 64 Wash. 1, 116 Pac. 257, Ann. Cas. 1913 A. 344, 34 L. R. A. (N. S.) 1166; *Collins v. Spokane*, 64 Wash. 153, 116 Pac. 663, 35 L. R. A. (N. S.) 840.

Upon the oral argument, however, we were invited to hold the provision of the charter in question inoperative, because to give it effect would work a hardship upon the appellants. The language of the charter is plain and positive. Without assembling the cases, it may be said that this court has a number of times sustained the charter provision as both constitutional and reasonable. It hardly seems necessary to again enter upon a detailed consideration and discussion of the question.

The judgment will be affirmed.

MORRIS, C. J., ELLIS, FULLERTON, and CROW, JJ., concur.

[No. 12592. Department One. July 21, 1915.]

A. ANDERSON, *Plaintiff*, v. HENRY GARRISON *et al.*,
Defendants, E. K. WORTHINGTON *et al.*,
Garnishee Defendants.¹

GARNISHMENT—DEFENSES—PAYMENT TO DEBTOR'S CREDITOR. Where the garnishee was indebted to the judgment debtor at the time of the service of the writ, it is no defense to the writ that the garnishee subsequently paid the money to a *bona fide* creditor of the judgment debtor.

Appeal from a judgment of the superior court for King county, Frater, J., entered September 26, 1914, upon findings in favor of the plaintiff, in garnishment proceedings, tried to the court. Affirmed.

¹Reported in 150 Pac. 419.

Smith, Foster & Worthington, for appellant Erickson Construction Company.

Carl. J. Smith, for respondent.

PER CURIAM.—Appeal from a judgment entered against Erickson Construction Company, garnishee defendant. The only question involved is the sufficiency of the evidence to sustain the judgment.

It is clear from the record that, at the time of the service of the writ, the garnishee was indebted to the judgment debtor in an amount exceeding the judgment. The only defense on behalf of the garnishee is that the judgment debtor, at the time of the service of the writ, was indebted to one Worthington, to whom the money in the hands of the garnishee was paid subsequent to the service of the writ. This is not a defense. The service of the writ of garnishment subjected the money in the hands of the garnishee, to which the judgment debtor was entitled, to the payment of respondent's claim, and if the garnishee subsequently paid the money to the judgment debtor or to any of his *bona fide* creditors, such payment will not relieve against the liability created by the service of the writ.

The judgment is affirmed.

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Syllabus.

[No. 12689. Department One. July 21, 1915.]

THE STATE OF WASHINGTON, *on the Relation of the City of Tacoma, Respondent*, v. SUNSET TELEPHONE & TELEGRAPH COMPANY, *Appellant*.¹

TELEGRAPHS AND TELEPHONES—FRANCHISES—POWER TO GRANT—CONDITIONS—STATUTES—CONSTRUCTION. A city of the first class has power to grant a telephone franchise for the use of the city's streets and alleys, with any lawful conditions attached against sales or transfers to other companies without the consent of the city, or for forfeiture upon nonperformance of its undertakings, under Rem. & Bal. Code, § 7507, subd. 7, empowering first class cities to regulate and control the use of streets and alleys and to authorize or prohibit the use of electricity at, in or upon them, and to prescribe the terms and conditions upon which the same may be used and to regulate the use thereof.

SAME—FRANCHISE—POWER TO GRANT—STATUTES—IMPLIED REPEAL. Rem. & Bal. Code, § 7507, subd. 7, empowering cities of the first class to grant telephone franchises for the use of its streets and alleys, was not impliedly repealed by the enactment of the general telephone franchise act of 1890, Id., § 9300 *et seq.*

SAME—FRANCHISES—CONDITIONS—ACCEPTANCE. Where a telephone franchise with attached conditions was accepted by the grantee, the franchise itself would be unauthorized if the qualifications and conditions imposed were beyond the power of the city, except as the terms and conditions are deemed subject to the general law.

SAME—FRANCHISES—CONDITIONS AGAINST ALIENATION—VALIDITY—PUBLIC POLICY. A condition in a telephone franchise ordinance that the grantee shall not sell or transfer the franchise or telephone system, except to a corporation to be organized by the original grantee, and expressly forbidding the transfer to any other telephone company without the consent of the city, evidently intended to maintain competition and prevent monopoly, is not void as against public policy, nor *ultra vires*.

SAME—FRANCHISES—CONDITIONS AGAINST ALIENATION—MORTGAGES—INVOLUNTARY SALE. A condition in a telephone franchise ordinance that the grantee shall not sell or transfer the franchise or telephone system, except to a corporation to be organized by the original grantee, and expressly forbidding the transfer to any other telephone company without the consent of the city, is not violated,

¹Reported in 150 Pac. 427.

and a cause of forfeiture does not arise, by the giving of a voluntary mortgage, followed by an involuntary foreclosure and sale under which another telephone company acquired the franchise and telephone system; in view of Rem. & Bal. Code, § 520, which provides that franchises may be mortgaged and sold under execution or foreclosure, and Const., art. 12, § 8, providing that no corporation shall alienate any franchise so as to relieve the franchise or property from the liabilities of the grantee.

SAME—FRANCHISE — FORFEITURE — COMPLIANCE WITH CONDITIONS. A telephone franchise ordinance, referring in the first section to an automatic telephone system, but in the granting clause authorizing the grantee to use the streets for the transmission of sounds and conversation by electricity, and to construct an automatic telephone system, and a telegraph system, does not require the grantee to operate an automatic system exclusively; and abandonment of the automatic feature for a manual system is not ground for the forfeiture of the franchise for failure to comply with its terms; forfeitures being abhorred in the law and avoided if possible.

SAME. In such a case, the failure to furnish the city with sixty automatic telephones and desk extensions as provided in the ordinance, would not be ground for forfeiture of the franchise, where the grantee was furnishing the city with the required number of manual telephones.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered November 27, 1914, in favor of the plaintiff, upon sustaining a demurrer to the answer, in proceedings to enforce the forfeiture of a franchise. **Reversed.**

Pillsbury, Madison & Sutro and Bates, Peer & Peterson, for appellant.

T. L. Stiles and Frank M. Carnahan, for respondent.

HOLCOMB, J.—The respondent brought action against appellant and Home Telephone Company of Puget Sound in the nature of *quo warranto*, to enforce the forfeiture of a franchise. The information or complaint shows that, in December, 1905, the city council of the city of Tacoma passed ordinance No. 2,522, granting a telephone and telegraph franchise. The title and material parts of the ordinance were as follows:

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"Ordinance No. 2522. An ordinance granting to Edward E. Webster, his successors and assigns, the right to lay and maintain underground conduits, cables and wires, and to construct necessary manholes, make house connections, and to erect poles and thereon to fasten wires in the streets and alleys, and to operate an automatic telephone system, and telegraph system and business, in the city of Tacoma.

"Be it ordained by the City of Tacoma:

"Section 1. That Edward E. Webster, his successors and assigns, be and is hereby granted for a period of twenty-five years, the right, privilege and franchise to erect poles with the necessary supports, cross-arms and fixtures, and to string wires and cables thereon, and to construct underground conduits, together with the necessary manholes and other appliances, and to lay, place and stretch wires and cables therein and along, over, upon, under and across the streets, alleys, avenues and public places of the city of Tacoma, Washington, for the transmission of sounds, signals, conversation and intelligence through and over said wires and cables by means of electricity, and to construct, establish, equip, install, maintain and operate, an automatic telephone system and a telegraph system, and to conduct a general telephone and telegraph business within said city of Tacoma."

Section 2 provides that the ordinance shall not be deemed exclusive.

Section 3 provides for the manner in which conduits shall be laid and excavations made in the streets.

Section 4 provides the manner in which traps and manholes shall be constructed.

Section 5 provides the manner in which the poles shall be erected, and provides that the city shall have the right to have certain poles removed and the wires placed underground.

Section 6 provides that, before the construction of the conduits, the grantee shall file with the commissioner of public works of the city of Tacoma detailed plans and specifications, etc., and that before work shall be done the same shall be approved by the commissioner of public works or the city council.

Section 7 provides that, in the event of change of any grade, the laying of a sewer, or the making of any public improvement in any of the streets and alleys along or under which the said conduits may be placed, which shall render necessary any changes in the position of the conduits, the grantee, or its successors and assigns, shall move the same at his, or its, own cost and expense, and failing to do so within a reasonable time the city may do so at the expense of the grantee.

Section 8 provides for the holding of the city harmless from any cost or damages during the construction of the work, and that the grantee shall put up a bond for ten thousand dollars, conditioned to hold the city harmless.

Section 9 provides for the cutting, raising or removal of any of the wires of the grantee, so as to allow moving of buildings through the streets.

Section 10 provides that the city shall have the right, at any time during the life of this franchise, to purchase, at a reasonable price, the property of the grantee, its successors or assigns, obtained, constructed and maintained under the provisions of this ordinance, and provides for the manner of arriving at the value thereof.

"Section 11. That the said grantee, his successors and assigns, shall within thirty days from the date of the commencement of the operation of said telephone system furnish to the city of Tacoma on demand the telephones necessary for the transaction of the city business not to exceed sixty telephones and fifteen desk extension telephones connected and operated with said system, and shall thereafter maintain and keep the same in repair without expense or charge to said city. Said grantee, his successors and assigns, shall if required by said city, for municipal purposes, furnish space in his conduits for twenty-five pairs of wires and space on his poles equal to one gain to be installed by said city and to be used for fire and police alarm purposes; provided, however, that said city in its use of such space comply with the reasonable plans and rules of said grantee, his successors and assigns, and in no case shall the wires of said city so installed

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carry an electric current greater than, nor dangerous to the proper operation of, the wires of said grantee, his successors and assigns.

"Section 12. That the work of constructing said system shall be commenced in good faith within four months of the date of the acceptance of this franchise and shall be continuously prosecuted thereafter in good faith, and such system shall be completed within not more than two and one-half years thereafter, with an ultimate capacity and extent to accommodate at least six thousand subscribers, and if said work be not so commenced, prosecuted and completed and in continuous operation within the time and manner herein specified and if the grantee shall expend in the construction of said telephone system less than fifty thousand dollars during the first six months after commencing the work of construction under this franchise and less than an additional one hundred thousand dollars in the construction of said system within one year thereafter, then this franchise shall be subject to forfeiture."

Section 13 fixes the rates to be charged for telephone service.

"Section 14. That except as hereinafter provided said grantee, his successors and assigns, shall not without the consent of the city evidenced by ordinance passed by two-thirds vote of all the members of the city council, sell or transfer the conduits, poles, wires or appliances of any kind or description or sell, lease, transfer or assign any of the rights or privileges herein authorized or granted to any person, company, trust or corporation now or hereafter engaged in the telephone or conduit business in said city of Tacoma; and shall not at any time enter into any combination directly or indirectly with any person or persons or any corporation concerning the rates to be charged for telephone service; and no officers, directors, employes, or managers of the conduit or telephone system authorized under this franchise shall at any time be in charge of, or officers, directors, employes or managers of, any other conduit or telephone system constructed or being operated in said city; provided, however, that said grantee may assign this franchise to a corporation organized by him under the laws of the state of Washington or some other state of the United States for the

purpose of carrying on a general telephone and telegraph business.

"Section 15. That the person, copartnership, company or corporation who shall own and operate under this franchise, shall during the life of this franchise pay to the city of Tacoma in lawful money of the United States the sum of one per cent of the gross annual receipts of such grantee, his successors and assigns, from the telephone rentals within said city for each and every year, and the city reserves the right to increase the amount of said license fee to 2 per cent at any time after the first five years during the life of this franchise; provided that no increase in the rate of said tax shall be made until all other telephone companies doing business in said city shall be required to pay an equal rate of taxation.

"Said grantee, his successors and assigns, shall on or before the second Monday in January of each year, furnish to the city comptroller of said city a sworn statement of such gross receipts for the previous year's business, and shall on or before the 15th day of January in each year, for the first five years of the life of this franchise pay the amount of one per cent thereof to the city treasurer and after the expiration of said five years shall pay such sum as the city council may require, not exceeding two per cent of such gross receipts. The city comptroller or such other person or persons as the city council of said city shall by resolution appoint for that purpose shall, if said statement is not satisfactory to said city, have the right to inspect the books of grantee, his successors and assigns and this franchise may be forfeited by failure to make the payments herein provided for or by refusal to allow the inspection within ten days after demand therefor duly made."

Section 16 provides for matters that have no bearing on this case.

Section 17 provides for the acceptance of the franchise by the grantee.

Section 18 provides for a deposit with the city treasurer as a guarantee that the grantee will commence construction of said telephone system within a certain time.

"Section 19. That any neglect, failure or refusal to comply with any of the conditions of this franchise or grant shall render the same subject to forfeiture.

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"Section 20. By the acceptance of this franchise the grantee, his successors or assigns, hereby expressly agree that when any portion of the city of Tacoma is without telephone service and the number of persons in such locality desiring same shall equal at least one subscriber for every three hundred feet of new pole line required to reach such new subscriber the same shall be installed by said grantee, its successors or assigns, within six months after application is made for same; and it is further expressly agreed that the charges for the same kind of telephone service shall be uniform throughout the city.

"Section 21. The city of Tacoma reserves the right to make any reasonable amendment of this ordinance which necessity may require, having due regard, however, to the vested rights and business interests of the grantee, his successors and assigns."

Webster accepted the ordinance in due time, and the council, at his request, passed ordinance No. 2,694, consenting to his assigning the franchise to the Home Telephone Company of Puget Sound. This ordinance recited the history of the matter, and ordained as follows:

"Section 1. That the consent of the city of Tacoma be and the same hereby is given to the said Edward E. Webster, to assign, transfer, and set over to the Home Telephone Company of Puget Sound, a corporation organized under the laws of the state of Washington, the said franchise and all rights, privileges and authority therein granted by ordinance No. 2,522, entitled, 'An ordinance granting to Edward E. Webster, his successors and assigns, the right to lay and maintain under ground conduits, cables and wires and to construct necessary manholes, make house connections and to erect poles and thereon to fasten wires in the streets and alleys, and to operate an automatic telephone and telegraph system and business in the city of Tacoma.' And the said Home Telephone Company of Puget Sound shall take the same subject to all the terms and conditions set out and contained in said ordinance."

Respondent, in its complaint, after alleging the passage of the ordinance above mentioned, and the other matters stated, set forth that the Home Telephone Company of

Puget Sound constructed, maintained and operated an automatic telephone business in the city, established a large central station, and had subscribers for more than six thousand telephones, whom it furnished with telephone service at the rates prescribed in the ordinance, furnished the city sixty telephones of the value of one hundred dollars per month free of charge, and paid the city one per cent of its gross annual earnings. Breaches of the terms and conditions of the ordinance were then alleged as follows:

"1. That the Home Telephone Company of Puget Sound in May, 1911, became insolvent and was unable to continue the operation of its telephone system, and suffered its creditors to seize and sell all of its property by judicial decree, and without the consent of the city suffered the Sunset Telephone and Telegraph Company to become the purchaser at such sale; and that the Sunset Company had been and was a California corporation doing business as a telephone company and operating a telephone system in the city pursuant to rights, privileges and franchises granted by ordinance No. 21, passed March 24, 1884, and certain ordinances amendatory thereof.

"2. That thereupon the said Sunset Telephone and Telegraph Company, by its managers, servants and agents, took possession of the telephone station of said Home Telephone Company of Puget Sound, in said city, and of all its automatic telephones, and its conduits, poles, wires and appliances of every description, and wrecked, dismantled and destroyed the same as an automatic telephone system, and entirely ceased to operate the same, and deprived said city and its inhabitants of all automatic telephones and of all competition in the telephone business; and deprived said city of the sixty telephones contracted for by said ordinance No. 2,522, and of all revenue from one per cent of the gross receipts of said automatic telephone business; and said Sunset Telephone and Telegraph Company refused to allow subscribers for said automatic telephones who had contracts with said Home Telephone Company of Puget Sound, to retain their automatic telephones already installed within their premises and compelled said subscribers, if they desired telephone service at all, to make new contracts with it for the

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same, and allow its Bell telephones to be installed in their place.

"3. That said Home Telephone Company of Puget Sound and said Sunset Telephone & Telegraph Company have, and each of them has, wholly abandoned the enterprise of constructing and operating the automatic telephone system in said city of Tacoma, contemplated and stipulated for by said ordinance No. 2,522 and said abandonment has continued for more than two years last past; and it is not the intention of either of said defendants to resume the operation of said automatic telephone system in said city, or to furnish the said city or its inhabitants with any competitive telephone system whatever."

On the 27th day of March, 1912, the council passed ordinance No. 4,907, declaring the franchise granted by ordinance No. 2,522 forfeited for the reasons therein and hereinbefore set forth, and repealing the ordinance. This ordinance directed the city attorney to procure from the courts a confirmation of the declaration of forfeiture, and the commissioner of public works to remove the telephone poles, wires, etc., from the streets after sixty days from the time the repealing ordinance should go into effect, and take possession of the manholes and conduits.

Appellant's answer denied breaches of the conditions, and affirmatively averred, among other things, that, under a certain mortgage foreclosure proceeding in the United States circuit court for the western district of Washington, northern division, under a certain mortgage and deed of trust given by the Home Telephone Company of Puget Sound to the Title Insurance and Trust Company to secure bonds issued by the Home Telephone Company, a decree of foreclosure was had, in which it was, among other things, provided that all of the property of the Home Telephone Company of Puget Sound, including the franchise originally granted to E. E. Webster by ordinance No. 2,522 of Tacoma, be sold as a unit; that, after a number of unsuccessful public offers of sale under the decree of sale, on December 9, 1911, the de-

defendant purchased, at public sale under the foreclosure decree, all of the property as a unit, for the sum of \$550,000, which sum was accepted and the sale confirmed to defendant by the court, and a deed duly executed and delivered to defendant by a special trustee of the court.

There are further affirmative allegations in the answer tending to show that appellant has complied with every condition of the Home Telephone franchise, except that it does not use the automatic 'phone system, but furnishes in place of the automatic 'phone furnished by the Home Telephone Company, manual 'phones used and furnished by appellant. The Home Telephone Company defaulted in this action. The relator demurred to the answer of appellant, the demurrer was sustained, and a judgment of forfeiture was entered against appellant.

The superior court based its judgment sustaining the demurrer to appellant's answer solely upon the ground that the fourteenth section of ordinance No. 2,522 "expressly prohibits the Sunset Company from acquiring any rights under the franchise; that the Home Company took its franchise subject to all its conditions, and it follows that the judicial sale passes only such rights as the Home Company had."

I. We are not impressed with appellant's contentions (1) that the city had no power to attach conditions to the Webster franchise; and (2) that, even if it had the power to attach conditions, the conditions attached were void.

The state had previously delegated to cities of the first class, of which relator is one, the general power "to lay out, establish, . . . streets, alleys . . . and to regulate and control the use thereof, . . . and to authorize or prohibit the use of electricity at, in, or upon any of said streets, or for other purposes, and to prescribe the terms and conditions upon which the same may be so used, and to regulate the use thereof." Rem. & Bal. Code, § 7507, subd. 7.

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Though appellant insists that this statutory provision is not a grant of power in regard to telephone franchises, because "it does not, in express terms, refer to telephone lines, or purport to confer the right to grant telephone franchises," we do not agree therewith. The power is both generally and specifically conferred.

Again, appellant urges that, even if the power were conferred by § 7507, *supra*, it was repealed by the subsequent enactment by the same legislature of § 9814, Rem. & Bal. Code (Laws 1890, pp. 292-294; Rem & Bal. Code, §§ 9300 *et seq.*), being the general telephone franchise act. These contentions were certainly decided adversely to appellant's views in *State ex rel. Spokane & B. C. Tel. Co. v. Spokane*, 24 Wash. 53, 63 Pac. 1116, and in *Tacoma R. & Power Co. v. Tacoma*, 79 Wash. 508, 140 Pac. 565. Notwithstanding appellant's argument to the contrary, in both the cases mentioned, it was distinctly held that the power to regulate and control the use of the streets was conferred by § 7507, subd. 7, *supra*, including the power to attach conditions. The question is not open to debate. All of the conditions imposed were within the city's corporate powers and valid conditions attaching to the franchise. Indeed, if not, then Webster never obtained the city's assent to the use of the streets and never had a franchise therefor. For it is incontrovertible that the city gave its assent upon certain conditions accepted by the grantee in express and positive terms. The grantee assigned to the Home Company by and with the consent of the city formally expressed, and subject to all the terms and conditions of the original grant. As said by the court in *Southern Bell Tel. & Tel. Co. v. Richmond*, 103 Fed. 31,

"If the terms were distasteful to the company, it could have refused them, or, at the least, protested against them. It is contended [by the company] that under the act of the legislature the city council could give only a categorical answer to the request for its consent, 'Yes' or 'No,' without terms or conditions. . . . It may safely be assumed that, without such qualifications and conditions, consent would

not have been given; that they were the reasons and motive cause for the consent. Then, if the city council could not have given—had no authority to give—a conditional or qualified consent, its attempt to consent was unauthorized, *ultra vires*, and void, and in fact it never has consented in the only way in which complainants maintain it could consent. From this point of view, the condition precedent of the act of the general assembly has not been performed. In order to maintain and operate its lines in Richmond, the telephone company is without the consent of the council, and must obtain it.”

The statute of Virginia delegating power to cities, the conditions imposed by the city for the grant of franchise, and the acceptance thereof were extremely analogous to the case here, and the foregoing observations are exactly pertinent to the case in hand. The terms and conditions, however, must, in respect to certain restrictions, exceptions and limitations as to both parties, be deemed to be subject to the general law. This leads us to the consideration of the condition prohibiting alienation of the franchise.

II. The ordinance forbids any sale or transfer of the franchise and telephone system, except to a corporation to be organized by the original grantee, which was effected by and with the express consent of the city formally expressed in its subsequent ordinance No. 2,694, by which the Home Company became the franchise holder. The clause against alienation contained in § 14, ordinance No. 2,522, expressly forbade transfer to any other telephone company without the consent of the city, the purpose evidently being to maintain competition in telephone service and prevent monopoly. The relator maintains, and was sustained therein by the trial court, that this condition was absolute, and prevents and avoids even an involuntary transfer by operation of law.

In general, the provision was a valid condition with valid reasons to support it, and was an agreed provision of the contract. It was not, as appellant supposes, void as against public policy, nor *ultra vires* and void as beyond the cor-

porate power of the city. But we know of no case where any such condition has been held to defeat a transfer purely *in invitum*. Relator makes no pretension, in pleading or argument, that the foreclosure and sale under the deed of trust were collusive or colorable. There are many cases to the effect that covenants not to assign during the term of a lease, where the covenant is well known to be for the benefit of the landlord's right to personally select his tenant, will not be held to prevent a transfer by operation of law, as by judicial sale, where there is no indication that the proceedings are voluntary and collusive, or colorable. A case directly to the point is *Detroit v. Mutual Gaslight Co.*, 43 Mich. 594, 5 N. W. 1039. There, as here, a company accepting a franchise coupled with a covenant not to assign or transfer, mortgaged its property and franchise and the mortgage was defaulted, foreclosed, and the franchise and property sold under the foreclosure. The court there held that the condition against alienation did not avoid the transfer. For cases analogous upon such covenants in lease contracts, see: *Riggs v. Pursell*, 66 N. Y. 193; *Doe v. Bevan*, 3 Maule & Sel. 353; *Dunlop v. Mulry*, 85 App. Div. 498, 83 N. Y. Supp. 477, 1104; *Bemis v. Wilder*, 100 Mass. 446; *Crouse v. Michell*, 130 Mich. 347, 90 N. W. 32, 97 Am. St. 479; *Randol v. Scott*, 110 Cal. 488, 42 Pac. 970; *Fleming v. Fleming Hotel Co.*, 69 N. J. Eq. 715, 61 Atl. 157; *In re Bush*, 126 Fed. 878; *Munkwitz v. Uhlig*, 64 Wis. 380, 25 N. W. 424; *Gaslay v. Williams*, 147 Fed. 678, 14 L. R. A. (N. S.) 1199; Taylor, Landlord and Tenant (9th ed.), § 408. To constitute a breach of a covenant not to assign (in a lease), there must have been a sufficiently formal assignment by the lessee, voluntarily, carrying the legal estate. *In re Bush*, *supra*.

The argument of relator seems to imply that the voluntary giving of a mortgage by the Home Company renders the alienation by judicial sale voluntary. But as pointed out in *Detroit v. Mutual Gaslight Co.*, *supra*, the giving of a mort-

gage is only pledging the property as security for a debt, and conveying only an equitable interest and not the legal title. The same reasoning was applied in the lease case *In re Bush, supra*. Our law provides that franchises may be sold upon execution and may be mortgaged and sold under mortgage foreclosure. Rem. & Bal. Code, § 520 (P. C. 81 § 841). Our constitution (art. 12, § 8) provides that "No corporation shall lease or alienate any franchise, so as to relieve the franchise, or property held thereunder, from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise or any of its privileges."

It must, therefore, be considered that all parties dealt with the subject-matter with full consideration of the existing law, and that such duties and privileges as the law expressed were portions of the contracts and transactions. The law authorizing the judicial sale of property and franchise was part of the contract. The constitutional provision making the franchise and property subject to all liabilities under the franchise also entered into the entire series of transactions and follows and binds even the purchaser at judicial sale, for it must be held to purchase with full knowledge and understanding of all legal conditions attaching under the paramount law to the franchise. The purchaser even at judicial sale of a public franchise cannot enjoy the easements and other privileges without assuming the burdens attached.

Upon principle and precedent, therefore, we are agreed that the involuntary transfer of the Home Company's franchise and property, through judicial sale and by operation of law, did not give rise to a cause of forfeiture against a purchaser in good faith.

III. The court did not give heed to any of the other grounds of forfeiture alleged in the complaint, denied in the answer, and affirmatively alleged not to exist, in fact, by appellant in its answer.

As to the maintenance of an "automatic" 'phone system, relator contends that to have been a condition of the franchise. We do not find in the ordinance relating to the franchise and the maintenance of the system any stipulation that the grantee would establish, operate and maintain automatic 'phones *exclusively*. We use the word "exclusively" advisedly, for the title to ordinance No. 2,522, and the first section, use the words "automatic telephone system," but the granting words contained in the first section are as follows:

" . . . to lay, place and stretch wires and cables, therein and along, over, upon, under and across the streets, alleys, etc., for the transmission of sounds, signals, conversation and intelligence through and over said wires, etc., by means of electricity, and to construct, establish, equip, install, maintain and operate an automatic telephone system, and a telegraph system, and to conduct a general telephone and telegraph business."

It appears to us, firstly, that the word "automatic" is purely descriptive of one kind of telephone system that might be "installed, established, maintained and operated" by the grantee, but that the grantee would not be held to establish, maintain and operate only an "automatic" or self-acting system of appliances. It was authorized but not compelled to establish, maintain and operate such system; in fact, it was authorized but not compelled to establish, maintain and operate a telephone system. As aptly argued by counsel for appellant, "Relator could with equal justification, argue that there was a condition absolutely requiring the maintenance of a *telegraph* system, or that, if a system were installed with all the wires underground, the franchise would be forfeitable for the failure to erect poles." Secondly, if the automatic telephone system, whatever that consisted of, proved in time to be inadequate or unsatisfactory, doubtless the city or its citizens would hasten to complain to the constituted authorities to compel the telephone company to replace the same with adequate and satisfactory equipment and appliances such as in-

ventive ingenuity provided as the highest standard of convenience and utility. The argument of relator, that "one of the purposes of chartering the automatic system was to get something like decent service," is now not sound. In these days ample and effectual regulation and control of all such public utilities obtain by and through the state's mandatory agencies, both as to economy and as to conveniences. The old clamor for competition and against monopoly in public utilities of almost every character has largely ceased, and the fundamental reasons therefor, in general, have vanished under public regulation. Monopoly of service in public utilities no longer terrifies. Economy of service and of cost to the public, together with the highest kind of efficiency and adaptability to use, is now demanded and enforced. Whether the "automatic" or the manual system of telephones is the better, we consider of small concern to the corporation of Tacoma, but whichever may be most efficient and convenient to the citizens of Tacoma we doubt not will in time be demanded and obtained. The argument of relator that the abandonment by the appellant of the "automatic" telephones constituted nonuser of the franchise, is also unsound. We must concede that it is not only the right, but the duty, of the public utility concern to discard inconvenient or obsolete apparatus and provide the best available. We do not know whether it has merely done that or not. But it is a principle of universal application that forfeitures are abhorred in the law and will not be declared except in the clearest and most positive cases, or where the contract broken so provides in express terms. A forfeiture will be avoided if possible. The franchise ordinance was not plain and positive that one of the conditions upon which it was granted was that the holder of the franchise should establish, maintain and operate an automatic system only, during the term of the franchise, for it was authorized also to "conduct a general telephone business," and therefore dedicated its property to public use with all the duties, liabilities and requirements as well as privileges,

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under our constitution and laws, such dedication implied. It seems clear that the mere nonuse or abandonment of the automatic telephone would no more be a ground of forfeiture than the nonuse or abandonment of poles and wires upon the streets, or conduits under the streets.

IV. It is apparently conceded by relator that appellant has paid or tendered all or more than the stipulated one per centum of the gross earnings of the total business earned under the Home Telephone Company's franchise, so that there is no ground of forfeiture there.

V. We are not entirely clear as to whether relator relies upon the alleged failure of appellant to furnish relator with the sixty telephones and fifteen desk extension telephones connected and operated with the system without expense to the city, as stipulated in the ordinance. We are under the impression, however, from statements by counsel in argument and in relator's brief, that the situation is, that appellant is not furnishing the automatic telephones, but is furnishing relator, without expense to it, manual telephones to the specified number under the franchise. If that is the case, we do not consider the relator has a ground for forfeiture under that provision. In fact, we should consider a failure in that respect a trivial failure, and believe that relator is also indifferent to that reason for asserting a forfeiture, if no other more valid and substantial reason exists.

We conclude, therefore, that appellant has a valid title by purchase at judicial sale of the franchise and property of the Home Telephone Company of Puget Sound, and holds same subject to all the conditions stipulated as conditions in the grant of the franchise by the relator, and implied under the constitution and general laws of the state, and has not given cause of forfeiture thereof.

The judgment is therefore reversed and the cause dismissed.

MORRIS, C. J., MOUNT, CHADWICK, and PARKER, JJ., concur.

[No. 12716. Department One. July 21, 1915.]

LEE HONG, *Respondent*, v. E. SCHOENWALD *et al.*,

Appellants.¹

CONTRACTS—PERFORMANCE OR BREACH—EVIDENCE—ADMISSIBILITY. Upon an issue as to whether a shortage in a salmon pack was due to the fault of the plaintiff and his crew of packers, or to the failure of the defendant's machinery and equipment which he had agreed with plaintiff to furnish and keep in repair, evidence as to the defective and worn-out condition of the machinery at the beginning of the season and describing its then condition, and that it frequently broke down and failed to work properly, is admissible as tending to show defendant's breach of contract.

SAME—PERFORMANCE OR BREACH—ADMISSIONS AGAINST INTEREST—STATEMENT OF AGENT. In such a case, evidence of the statement made by defendant's cannery foreman in charge of the plant, upon plaintiff's complaint as to the defective condition of the machinery, that it was left in bad condition the year before, and "no man in the United States could fix it," is an admission of defendant's *alter ego* against interest, and is not inadmissible as a mere expression of opinion.

PLEADINGS—VARIANCE—MATERIALITY—SHOWING. A variance in the admission of evidence tending to somewhat broaden the scope of the issues is nonprejudicial, where no continuance was demanded and no showing made that the party was misled to his prejudice, in view of Rem. & Bal. Code, § 299, providing that no variance shall be material unless it actually misleads the party to his prejudice, and providing that the fact shall be shown to the satisfaction of the court, and for amendments to the pleadings on such terms as may be just.

Appeal from a judgment of the superior court for King county, Albertson, J., entered February 15, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Winfield R. Smith, for appellants.

R. W. Wilbur and *Jesse A. Frye*, for respondent.

¹Reported in 150 Pac. 436.

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HOLCOMB, J.—In the spring of 1913, plaintiff and the Pacific Coast & Norway Packing Company, a fish canning concern, entered into a written agreement whereby plaintiff agreed to furnish the cannery crew for the packing season of 1913, and to pack, lacquer, and label the cans for nine hundred cases of flat cans or thirteen hundred cases of tall cans of salmon, each day during the packing season, and in case of failure, plaintiff should pay the company for the shortage one dollar per case as liquidated damages. The agreement covered every phase of the work. It contains a proviso that:

“If such shortage of pack arises from the failure on the part of the party of the second part to furnish sufficient fish and other material or facilities or from failure of machinery to do the proper work, no charge shall be made for such shortage.”

Plaintiff alleged full performance of the contract, and that he had earned \$20,848.81, and had been paid \$12,385.90, leaving an unpaid balance of \$8,462.91, for the recovery of which this action was brought. The defendant company made answer, admitting that, had plaintiff fulfilled his contract, he would have earned the total sum alleged in the complaint, but denied performance by plaintiff, and denied that he had earned so much as the amount paid. The defendant further affirmatively set up in its answer that, without fault on its part, plaintiff fell short of the agreed pack a total of 11,200 cases between July 23 and August 17, 1913, as tabulated in the answer, and further, that plaintiff failed to label as agreed, and that defendant was compelled in consequence to pay out the various sums specified, aggregating some \$2,200, making a total damage to the defendant of \$13,482.92, and a consequent net overpayment by mistake to the plaintiff of \$4,965.66, for which amount, over and above plaintiff's claim, defendant demanded judgment. By way of reply, plaintiff alleged that any shortage was due, not to his fault, but to the fault and neglect of defendant in the fol-

lowing particulars: Failure to furnish sufficient fish; failure of machinery; failure to keep the machinery in repair and operation so as to enable the plaintiff to pack the required amount; and failure on the part of the defendant to furnish sufficient steam and power to operate the cannery adequately. After the issues were joined, the defendant company went into the hands of receivers, and the receivers were thereafter duly substituted for the company. The case was tried to a jury, which rendered a verdict in favor of respondent for \$7,167.02, with interest from December 1, 1913.

By stipulations and admissions, the issues of the pleadings were simplified and narrowed to the single question whether the shortage in pack between July 23 and August 17, 1913, and the outside labeling, which the defendant had done at Seattle, were the fault of plaintiff, as defendant claimed, owing to his crew being insufficient in number and incompetent and inefficient; or, as plaintiff claims, were due to the effect of insufficient machinery and equipment furnished by defendant, which plaintiff contends put it out of his power to do the packing and labeling. There is no dispute as to the shortage.

I. Appellants first complain that it was error for the court to admit evidence showing the condition of the cannery and machinery prior to July 23, 1913, after which time, until August 17, 1913, the cannery company claimed the shortage occurred. Under the contract it was the duty of the company to furnish the machinery, equipment, material, and facilities for the cannery crew to can, pack, lacquer, and label the cans and cases of fish. The respondent and his crew arrived at St. Petersburg, Alaska, where the cannery was situated, about the middle of April, 1913. The company's operatives also arrived about the same time. There was a machinist who had been employed and was engaged in overhauling the machinery, so as to put it in shape for operation from about that time until about the first of June, when the canning operations commenced. The machinery and

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equipment were fully described by witnesses who had been employed in overhauling, repairing, and putting it in shape to run. The respondent and the machinist who had been employed by the company testified as to the general appearance of the machinery when they arrived there, to the effect that it was old, worn, and rusty; that it was rusted so badly that, in order to take it apart and repair it, numerous parts had to be broken off and new parts supplied or old parts made over, and that it had been so left at the close of the season of the year before that this condition existed. This evidence was naturally inferential and was not improper.

Authorities are cited by appellants to the effect that the testimony of the condition of the machinery causing injury, some time before the injury occurred or some time subsequently, without any connective showing of the existence of that condition continuously to or from the time of the injury, is improper. With those authorities we agree, but they are not applicable here. Testimony of conditions subsequent to the matter in controversy is in most cases improper, for the logical reason that presumptions do not generally run backward. The evidence here tended to show that the condition of the machinery was evidenced by the condition that it had been left in, and that it was apparent and obvious. There was considerable evidence tending to show that the machinery frequently broke down and frequently refused to work properly, and that the failure of the machinery and appliances was the principal cause of the respondent's inability to furnish the required quota of packed fish during the time from July 23 to August 17, 1913. The fact that the witnesses detailed the condition of the machinery when they arrived there before the canning operations commenced would tend to throw some light on the question, from which the jury might determine whether or not it was the failure of the company's machinery, equipment, and appliances that caused the shortage during the period mentioned. We think there was no error in admitting the testimony. Jones, Evi-

dence, § 58; 1 Greenleaf, Evidence (16th ed.), p. 81; Wigmore, Evidence, § 437.

II. It is urged that it was error to permit respondent and other witnesses to testify to statements said to have been made to them by the cannery foreman, Robertson, as to machinery and cans, these not being in any wise binding as admissions or otherwise upon the company. Robertson was in general charge of the plant and machinery and had charge of its operation for the defendant company. In that respect, therefore, he was its *alter ego*. There is testimony that the respondent complained to Robertson of the defective condition of the machinery, by reason of which at the time in question he was unable to pack the required number of cases of fish per day, and that Robertson stated that "the machinery had been left in bad condition at the close of the previous season, and that no man in the United States could fix it." The court admitted these statements on the theory that they were admissions of defective condition. Appellants contend that they were mere exclamations or expressions of opinion. But there is nothing in the record to bear counsel out as to this contention. If Robertson made such statements he was, as the agent of the principal in control of the machinery, as capable of making an admission against interest as the company itself. In fact, he probably knew more of it than any of the executive officers of the company. An admission on his part would, therefore, be of greater weight than an admission by any officer, executive or otherwise, of the company. It is claimed, however, that, even if he made such admissions, he was not authorized so to do, such statements not being in connection with the duties of his employment. This contention is untenable. This man was in charge and had direct supervision of the repairs and renovations which had been attempted on the machinery, and was in charge of the operation of the machinery during the canning operations. The statements made by him concerning the matters directly in

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his charge were statements made by the company. Jones, Evidence, §§ 356, 357; 2 Thompson, Corporations, § 1620.

III. Appellants complain that, upon the pleadings in the case, it was error to admit evidence tending to show that the cans furnished by defendant to respondent were rusty and defective. It is true that the introduction of this testimony tended to somewhat broaden the scope of the issues tendered by respondent's reply to defendant's affirmative answer. The appellants, however, had pleaded generally that, without fault on the part of the defendant, the shortage had occurred. Respondent pleaded, in avoidance of this allegation, that the failure, if any, on his part was caused by certain enumerated faults and failure on the part of the defendant company to comply with its part of the agreement, which, being in avoidance of appellants' affirmative matter and counterclaim, were properly pleaded affirmatively. The matter of the defective cans was not specially pleaded in avoidance in respondent's reply, and it is true, in general, that proofs without averments and averments without proofs, are equally unavailing. Our code of pleading, however (Rem. & Bal. Code, § 299), provides that:

"No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just."

In *Olson v. Snake River Valley R. Co.*, 22 Wash. 139, 60 Pac. 156, this court, per Fullerton, Judge, said:

"The object of these provisions of the code was to correct the harshness of the common law rules relating to variance. They were intended to prevent a suitor having a meritorious cause of action from being thrown out of court, or a defendant having a valid defense from presenting that defense, for mistakes in his pleadings which do not affect

the merits of the controversy, or prejudice the rights of his adversary. Hence, under the rule of the code, it avails a litigant nothing to show a variance between his adversary's pleadings and proofs without showing a resulting injury. It must appear that he was, to repeat the language of the code, 'misled . . . to his prejudice, in maintaining his action or defense upon the merits.' Further, it will be noticed the statute requires the showing of prejudice to be made to the trial court, whose duty it then becomes to determine its sufficiency. If the court finds, upon such showing, that the adverse party has been misled to his prejudice by the variance—finds that the variance is material—it may order the pleadings amended upon such terms as may be just; . . . From these considerations this court will not presume error prejudicial to the complaining party simply because it may find a variance between the pleadings and proofs of his adversary."

On this point appellants rely largely upon the language of this court in *Oldfield v. Angeles Brewing & Malting Co.*, 72 Wash. 168, 129 Pac. 1098, quoting the language of the court as follows:

"This rule, however, has no application where the evidence has been introduced over objection and the issue tried was in no manner tendered in the complaint. . . . No leave to amend was requested. No rule of construction, however liberal, can permit the trial of an issue not tendered in the complaint over the objection of the defendant. To permit such a course would be to ignore the statute, dispense with formal pleadings, and invite endless confusion."

In that case, however, it is pointed out that the plaintiff in his complaint entirely mistook his cause of action. He based his cause of action upon an allegation of indebtedness due for a certain number of months' rental under a lease. The evidence in support of the complaint showed that there was a breach of an agreement to lease, and that the breach was made by the refusal of the intending lessee to accept the building. This court said:

"In such a case, the cause of action is entire and the measure of damages is the loss suffered, namely, the differ-

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ence between the entire rent reserved and the entire rental value for the term. It is obvious that the complaint, which did not tender as an issue that there was such a difference, did not allege any loss or damage, and hence did not state a cause of action."

In that case it was further shown that the appellant, at the commencement of the trial, objected to the introduction of any evidence on the ground that the complaint failed to state a cause of action, and upon the court's overruling the objection, the defendant then moved for a continuance in order to prepare to meet the issue of damages which was not presented by the complaint, but the court denied the continuance. In this case, appellants did not demand a continuance, and did not in any way show to the trial court that they were misled to their prejudice. The admission of the evidence was, therefore, an unprejudicial variance. *Cunningham v. Lakin*, 50 Wash. 394, 97 Pac. 447; *Peterson v. Barry*, 50 Wash. 361, 97 Pac. 239; *Lang v. Crescent Coal Co.*, 44 Wash. 267, 87 Pac. 261; *Kneeland Investment Co. v. Berendes*, 81 Wash. 372, 142 Pac. 869.

IV. Error is also claimed by appellants because of the admission of evidence showing that the company did not furnish respondent with sufficient light. What we have said with reference to the claim regarding the furnishing of rusty cans applies as well to this claim of error.

Judgment affirmed.

MORRIS, C. J., MOUNT, CHADWICK, and PARKER, JJ., concur.

[No. 12176. Department Two. July 21, 1915.]

MALCOLM McDOUGALL *et al.*, *Respondents*, v.

ANGUS V. McDONALD *et al.*, *Appellants*.¹

PLEADINGS—AMENDMENTS—VARIANCE—DISCRETION. In an action for an accounting and to recover profits under an agreement to obtain and prosecute certain railroad construction work, in which the complaint pleaded the profits obtained from only one contract for such work, it is discretionary to allow the complaint to be amended to include the profits under another contract secured and completed under the original agreement of the parties, where no surprise was claimed by defendant and no continuance asked.

CONTRACTS—CERTAINTY—EXECUTED CONTRACTS—ACTIONS—DEFENSES. Uncertainty and indefiniteness in a contract for a joint venture as to the financial aid and assistance which plaintiffs were to furnish the defendants in securing and prosecuting certain railroad construction work cannot be pleaded by defendants as a defense to an action to recover plaintiffs' share of the profits, where the contract had been fully executed and defendants had accepted the benefits, and nothing remained to be done except to make the final division of the profits.

JOINT ADVENTURES—PROFITS—EVIDENCE—ADMISSIBILITY. In an action to recover a share of the profits of a joint venture, evidence of the value of defendants' services is properly excluded where the court found, on sufficient evidence, that they were not to receive compensation for personal services.

PARTNERSHIP—CONTRACTS—AUTHORITY TO MAKE—RATIFICATION. Ratification of a contract made by one partner for financing railroad construction work to be prosecuted by the firm is sufficiently established where it appears that the other partner knowingly participated in the use of the funds secured by the agreement, which he never questioned until the completion of the construction contract.

Appeal from a judgment of the superior court for King county, Humphries, J., entered February 26, 1914, upon findings in favor of the plaintiffs, in an action for an accounting, tried to the court. Affirmed.

Karr & Gregory, for appellants.

Gay & Kellerman, for respondents.

¹Reported in 150 Pac. 628.

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CROW, J.—Action by Malcolm McDougall and R. J. Cameron against Angus V. McDonald and D. V. McDonald, co-partners as McDonald Brothers, to obtain an accounting and recover one-third of the profits earned in the performance of two construction contracts. From a judgment in plaintiffs' favor, the defendants have appealed.

Respondents claim they are entitled to one-third of the profits earned in the performance of two construction contracts, which they had assisted in financing and which had been performed by appellants. The trial judge, in substance, found that, in August, 1910, respondent Malcolm McDougall, acting on behalf of himself and on behalf of respondent R. J. Cameron, orally agreed with appellant D. V. McDonald, acting on behalf of himself and on behalf of appellant Angus V. McDonald, that respondents were to furnish the necessary funds to assist in financing and performing a certain contract which McDonald Brothers then had with the Northern Construction Company, Ltd., for the construction of a portion of the Canadian Northern Pacific Railway, in British Columbia; that respondents were to use their influence and efforts towards securing other construction contracts, and were to assist in financing the same; that all such contracts were to be carried on as joint ventures of all the parties; that appellants were to use their horses and equipment and give their individual time and efforts in prosecuting and performing the construction contracts without charge to respondents, and that the profits earned were to be divided as follows: To the respondents, one-third jointly; to Angus V. McDonald, one-third, and to D. V. McDonald, one-third.

The trial judge further found that respondents advanced \$10,000, which was received and used by appellants in the performance of the first contract, known as the Chilliwack contract; that thereafter an additional contract, known as the Kamloops job, was obtained on the same railway; that, for the purpose of financing it, respondents and D. V. McDon-

ald executed and delivered to the Merchants Bank of Canada a contract of guaranty or letter of credit, wherein and whereby the respondents guaranteed future advances to be made to appellants to the extent of \$25,000; that the letter of credit was furnished for the use and benefit of appellants, for the prosecution of the work under the terms of the original agreement; that thereby appellants secured from the bank large sums of money, aggregating at one time as much as \$13,990, which they used in the prosecution of the work and which has been repaid to the bank; that respondents have done all and singular the acts which they contracted to do; that a net profit of \$40,442.23 was earned on the construction contracts; that each of the contracts has been performed; that settlements have been made with the railway company; that appellants have paid \$15,000 to respondents, of which \$10,000 was to return advances made and \$5,000 was on account of profits, and that \$8,840.28 is still due respondents as their share of the profits.

The original complaint was based upon the first construction contract obtained by appellants, known as the Chilliwack contract. The Kamloops contract, which had been secured later, was not pleaded. Respondents had advanced \$10,000 in the performance of the first contract, and had executed the written guaranty or letter of credit for the purpose of financing the second. Funds thus advanced and obtained on their credit had been used on the two contracts, which had been fully performed. Prior to the trial, respondents notified appellants that an application would be made to amend the complaint. This amendment, which was allowed, was made for the purpose of pleading both construction contracts and all profits earned. Appellants claimed no surprise and made no application for a continuance, but proceeded to trial. The evidence introduced tended to support the allegations of the complaint, as amended, and we are unable to conclude that any material departure or variance in the

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pleadings was permitted. The trial judge acted well within his discretion in allowing the amendment.

Appellants further contend that the oral contract or agreement upon which this action is predicated was void, because it was uncertain and indefinite in that it failed to specify the amount of financial aid respondents were to furnish, or the nature of assistance which they were to give in securing additional contracts; that no time was fixed for the continuance of the agreement, and that no measure of damages was adopted in the event of its breach. If this were an action to enforce a specific performance, or to recover damages for a failure to perform the contract, there might be some merit in appellants' contention. The pleadings and evidence show, that the contract has been fully performed; that the construction work was completed; that final payments have been made to appellants by the railway company; that respondents have fully performed on their part by furnishing needed financial aid and credit, and that the contract is fully executed between respondents and appellants, save and except final division of the profits. Appellants have accepted the benefits of the contract and have used respondents' money and credit, and nothing further remains for respondents to do. Appellants at this time are in no position to refuse a division of profits on the ground of any uncertainty in their agreement with respondents. Full performance of the contract has made it certain in every respect in which, as an executory contract, it might have been regarded as uncertain. Appellants cannot be permitted to accept the benefits of this contract and then refuse to bear its burdens.

The remaining assignments of error go to the contention that the findings of the trial judge were not supported by the evidence, and that error was committed in the exclusion of evidence offered by appellants. The controlling issue of fact was whether a contract between respondents and appellants was made, entered into, and performed as contended by respondents. Upon this issue the evidence was conflicting,

but we conclude, from an examination of the entire record on a trial *de novo*, that it supports the findings of the trial judge, and that the contract was made as alleged. It is undisputed that respondents did advance \$10,000, which appellants accepted and used to finance the first construction contract; that respondents also executed the letter of credit to finance the second contract, upon which appellants obtained and used large sums of money; that the construction contracts have been performed; that \$10,000 has been repaid to respondents, together with \$5,000 on account of profits, and that the profits on the two construction contracts were correctly found by the trial court, provided appellants were to receive no compensation for their personal services or the use of their equipment before estimating such profits. The evidence was sufficient to support the finding of the trial judge that the appellants were not to receive compensation for personal services or use of equipment, but were to share profits with respondents in the proportion above named. The manner in which appellants kept their books strongly supports this finding. This being true, we conclude that the trial court committed no prejudicial error in excluding evidence of the value of appellants' services or the use of their equipment, as they were not entitled to recover for the same.

Contention is made, that D. V. McDonald had no authority to represent his partner, Angus V. McDonald, in making the contract with respondents; that Angus V. McDonald is not bound by his acts, and that as a result no contract between respondents and McDonald Brothers has been proven. The evidence clearly shows that Angus V. McDonald knew of the advances made by respondents; that he knowingly participated in the use of these funds in financing the first construction contract; that he knew of and consented to the use of the letter of credit in financing the second contract, and that he never questioned the agreement until the completion of the construction contracts. Our conclusion is that he had full knowledge of the agreement between respondents and ap-

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pellants made by D. V. McDonald, that he ratified the same, and that he cannot at this time successfully question its validity.

The judgment is affirmed.

FULLERTON, ELLIS, MAIN, and MOUNT, JJ., concur.

[No. 12643. Department One. July 21, 1915.]

D. V. McDONALD, *Respondent*, v. MALCOLM McDOUGALL,
Appellant.¹

LIMITATION OF ACTIONS—FRAUD—DISCOVERY—DILIGENCE—QUESTION FOR JURY. In an action for relief upon the ground of fraud, to be commenced, under Rem. & Bal. Code, § 159, subd. 4, within three years after discovery by the aggrieved party of the facts constituting the fraud, whether plaintiff discovered, or by the use of reasonable diligence could have discovered, the fraud so as to bar the action, is a question for the jury, where it appears that in 1908 plaintiff paid defendant \$15,000 to invest in mining stock upon the same basis as defendants and others had paid, which was five cents a share, but defendant purchased stock for plaintiff at fifteen cents a share; that plaintiff became a director in the corporation and had access to the books showing the prices others had paid, and there was evidence that he knew what others had paid; but plaintiff testified that he had the utmost confidence in the defendant, his suspicions were not aroused, his attention was not called to the records, he had no actual possession of the books, and no notice of the fact that his stock had been purchased at a greater sum than others had paid until December 1, 1913, and the action was commenced in February, 1914.

TRIAL—INSTRUCTIONS—ISSUES—PREJUDICE—OTHER CORRECT INSTRUCTIONS. In an action to recover for fraud in purchasing mining stock, at a price in excess of the price paid by defendant and others, contrary to the agreement of the parties, an instruction to the effect that defendant could not recover if he had notice, or as a reasonable man should have had notice of "the price he was paying for stock," is erroneous, as he admittedly knew such fact, and the issue was as to his knowledge as to the price paid by others; and the error is not cured by other correct instructions, given on the Saturday previous, where the erroneous instruction was given the next Monday morning as an additional instruction.

¹Reported in 150 Pac. 625.

Appeal from an order of the superior court for King county, Ronald, J., entered September 12, 1914, granting a new trial, after the verdict of a jury rendered in favor of the defendant, in an action for fraud. Affirmed.

Gay & Kellerau, for appellant.

Karr & Gregory, for respondent.

MOUNT, J.—This appeal is from an order which granted the plaintiff's motion for a new trial, in an action brought by the plaintiff to recover \$10,000 from the defendant. It appears that, in September, 1908, the plaintiff advanced to the defendant \$10,000 for the purpose of purchasing stock in the Cache Creek Mining Company, a corporation. Later, in November of the same year, the plaintiff advanced \$5,000 additional for the same purpose. The plaintiff testified in substance that he and the defendant had been intimately acquainted for the past twenty-five years, had been associated together a portion of this time in business matters, and that the plaintiff had the utmost confidence in the defendant; that the defendant, in September, 1908, importuned the plaintiff to invest in the mining venture in Alaska; that the defendant promised the plaintiff he would invest the money in the mining stock of the corporation upon the same basis as the defendant and others had been permitted to invest therein; that the plaintiff had the utmost confidence in the integrity of the defendant, and relied upon the defendant to use the money as directed; that the defendant, instead of purchasing shares in the company at the same rate that others had invested therein, purchased 100,000 shares of stock at 15 cents per share, while others had purchased the same stock at the rate of five cents per share; that the defendant had concealed this fact from the plaintiff and the plaintiff did not discover this deception until about December 1, 1913. The action was brought on the 7th day of February, 1914.

The defendant admitted that he received the \$15,000 from the plaintiff at the time stated, but alleged and testified that

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he received the money from the plaintiff for the purpose of purchasing shares in the corporation at the then current price at which the same were offered to the general public; that the current price of the shares at that time was 20 cents per share; but in view of the fact that others had been permitted to purchase stock at a less rate than 20 cents per share, he purchased shares of the company at the rate of 15 cents per share. He also testified, as alleged in answer to the complaint, that in November, 1908, the plaintiff was informed and well knew the amount that had been paid for the stock, that he was thereafter elected a director and vice president in the corporation, had access to the books which showed the amount that had been paid for the stock, and the amount that the other shareholders had paid for stock; that the defendant had made no concealment of the purchase price of the stock, and had not in any way defrauded the plaintiff, or concealed from him the price at which other stock had been purchased.

At the trial of the case, at the close of the plaintiff's evidence, and at the close of all the evidence, the defendant moved the court for a directed verdict on the ground that the statute of limitations had run against the claim. These motions were denied. The cause was submitted to the jury upon instructions given by the court, and a verdict was returned in favor of the defendant. Thereafter a motion for a new trial was filed by the plaintiff upon all the statutory grounds. The court granted the motion and entered an order as follows:

"Ordered that the plaintiff's motion for a new trial herein be and the same is hereby granted upon the ground that the court erred in giving to the jury the instructions to which exceptions were taken by the plaintiff and are on file herein, and that said motion be and the same is hereby denied upon all other grounds; and it is further ordered, that the plaintiff's motion for judgment notwithstanding the verdict herein be and the same is hereby denied."

The defendant has appealed from that order.

A number of errors are assigned in the brief of the appellant, but the points relied upon may be reduced to two: First, that the error was harmless, conceding the instruction to be erroneous upon which the court granted the motion for a new trial; and second, that the trial court should have directed a verdict in favor of the defendant. We shall notice these points in inverse order.

It is contended by the appellant that the trial court should have directed a verdict, because it is shown that the statute of limitations has run against the claim. It will be noticed that the \$15,000 above mentioned was furnished the defendant in the year 1908, and that the action was not begun until the year 1914. The statute, Rem. & Bal. Code, § 159, provides, that actions shall be begun within three years,

"4. An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud; . . ."

Construing this section, this court has held in a number of cases that whatever is notice enough to excite attention and put a party upon his guard, or call for an inquiry, is notice of everything to which such inquiry might have led.

"The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it. . . . A party defrauded must be diligent in making inquiry. The means of knowledge are equivalent to knowledge. A clue to the fact, which, if followed up diligently would lead to a discovery, is in law equivalent to discovery,—equivalent to knowledge." *Deering v. Holcomb*, 26 Wash. 588, 67 Pac. 240, 561.

See, also, *Irwin v. Holbrook*, 32 Wash. 349, 73 Pac. 360; *Wickham v. Sprague*, 18 Wash. 466, 51 Pac. 1055; *Morgan v. Morgan*, 10 Wash. 99, 38 Pac. 1054.

It is argued by the appellant with much reason that, because the plaintiff was a director in the corporation after his stock was purchased, he had access to the books of the

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corporation which showed the prices which other stockholders had paid for their stock, and the price at which plaintiff's stock had been purchased by the defendant. Ordinarily, we think this would be sufficient to put the plaintiff upon notice of what the records of the corporation contained. But the plaintiff in this case testified that he had the utmost confidence in the defendant, that his suspicions had never been aroused to the fact that he had paid more for his stock than other stockholders; that, while he was a director in the corporation, his attention had never been called to the minutes of the corporation which showed the prices at which the stock had been sold; that he had never had actual possession of the minute book or heard the minutes read; and that no notice of the fact that his stock had been purchased at a greater price than other stockholders had paid was brought to him until about December 1, 1913. If these statements are true, and they must be so taken by us in the consideration of this question, we think that, even under the rule as stated above, it was a question for the jury whether or not the plaintiff, as a reasonably prudent man, was diligent or actually knew, or should have known under the circumstances, the fact that the stock was purchased at a greater price than other stockholders had paid for their stock. We are satisfied, therefore, that this was a question to be submitted to the jury. If the plaintiff had actual notice of the price that other stockholders paid for their stock, or if any circumstances arose which would put him upon notice that his stock was purchased at a higher rate than that of other stockholders, or if, as an ordinarily prudent person, he was required to examine the minutes of the corporation prior to the time he became a director therein, then of course the action must have been brought within three years after the time when he should have discovered the fraud, if there was any fraud.

There was evidence on the part of the defendant that the plaintiff knew what his stock had cost at the time it was purchased. There was also evidence of the fact that he actu-

ally knew what other stockholders had paid for their stock, soon after that time. This, we think, made a question for the jury upon the fact whether or not the plaintiff knew, or should have known, what he himself had paid for his stock and what other stockholders had paid for their stock, more than three years prior to the bringing of the action. If he did know, or if he should have known, as a person reasonably diligent in looking after his affairs, he is now too late to maintain the action. The court, we think, very properly instructed the jury upon these questions. We think these were questions for the jury to pass upon. We are of the opinion, therefore, that the court did not err in submitting the question to the jury.

After the court had instructed the jury on May 29, 1914, the court took a recess until Monday, June 1, when the court gave an additional instruction as follows:

"Members of the jury: This court instructs further: That any fact may be established in the trial by circumstantial evidence, where the circumstances are sworn to by witnesses or established by other evidence produced upon the trial. Circumstances of fact must be of such a nature and character as to lead a reasonable man to but one conclusion, excluding all other hypothesis than that arrived at by the consideration of such circumstances.

"So in this case, you are instructed that you may consider all the circumstances shown at the trial, to establish, if you find they do establish, whether the plaintiff, McDonald, had notice, or as a reasonable man should have had notice, of the price he was paying for stock at or about the November meeting of November, 1908, or at about the February meeting in 1909, or at any other time prior to three years before the commencing of the present cause of action, and as I have told you, if he has had such notice, then he cannot recover."

The trial court was of the opinion that this instruction amounted to an instruction to the jury to return a verdict in favor of the defendant, for the reason that it was conceded that the defendant had purchased the stock at the

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price of 15 cents per share, and it was conceded, of course, that the plaintiff knew this fact. This instruction in substance told the jury that, if the plaintiff had notice of the price he was paying for his stock in November, 1908, and February, 1909, then he could not recover. It is plain to be seen that if this instruction was followed by the jury, no other verdict could have been rendered than a verdict for the defendant, because, as stated above, it was conceded by both parties that the purchase price of the stock was known to both the plaintiff and the defendant at the time of the purchase. The gist of the case was fraud, which was alleged to have been committed by the defendant, and not the price at which the stock was purchased. The plaintiff knew the price that his stock was purchased for. But he testified that he did not know that other stockholders had paid less for their stock than fifteen cents per share, that he was not told by the defendant of this fact, and that he did not discover it until several years after the stock had been purchased.

The principal questions of fact upon the trial were: Did the defendant agree to purchase stock in the company at the same price the promoters had paid? Did the defendant purchase at a greater price? Did the defendant lead the plaintiff to believe that he had paid the same price and conceal this fact from the plaintiff? Before the plaintiff can recover, the jury must find affirmatively upon all these questions, and in addition thereto that the plaintiff did not know the facts, and, as a reasonably prudent man, could not have discovered them prior to three years before the action was begun. The instruction quoted eliminated all these questions. It is plain, therefore, that this instruction was erroneous.

The appellant argues that, even if the instruction was erroneous, it was without prejudice, because the court had correctly instructed the jury at a former time in the trial. But the correct instructions were given on a Saturday evening, and this instruction was given the following Monday morning

and, of course, would greatly outweigh the correct instructions which had been given previously. We are satisfied, therefore, that the trial court concluded that this instruction was erroneous and harmful, and for that reason correctly granted a new trial.

The order appealed from is therefore affirmed.

MORRIS, C. J., CHADWICK, HOLCOMB, and PARKER, JJ., concur.

[No. 12595. Department Two. July 21, 1915.]

NELLIE FLEMING, *Appellant*, v. F. S. LANGLEY *et al.*,
Respondents.¹

JUDGMENT—COLLATERAL ATTACK. Judgment in an action of replevin, by a court of a sister state having jurisdiction of the subject-matter and of the person of the only defendant named as vendee in a bill of sale of the property, which determined the title to the property to be in the plaintiff, cannot be collaterally attacked by one claiming to have an interest with defendant as one of the vendees, even though the judgment be erroneous.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered June 11, 1914, upon findings in favor of the defendants, in an action for money paid, tried to the court. Affirmed.

Robertson & Miller and *F. W. Girard*, for appellant.

Belden & Belden and *M'Naughton & Berg*, for respondents.

CROW, J.—Action by Nellie Fleming against F. S. Langley and Annie Langley, his wife, to recover \$1,333.33, paid on the purchase price of a shingle mill. From a judgment in defendants' favor, the plaintiff has appealed.

Appellant, who is a married woman living separate and apart from her husband, in her complaint alleged, that, on or about April 30, 1913, she and her husband, William R. Flem-

¹Reported in 150 Pac. 418.

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ing, with whom she was then living, and one J. H. Weber, jointly purchased from the respondent F. S. Langley a shingle mill and certain logs located in Kootenai county, Idaho, for the sum of \$10,000; that \$2,000 was paid in cash; that the remainder was to be paid in monthly installments; that the purchase was made in the name of Weber, but for the joint benefit, use, and ownership of appellant, her husband and Weber; that appellant advanced \$1,333.33 of the purchase money; that respondent F. S. Langley knew she did so; that he also knew the purchase was made for appellant, her husband and Weber; that the vendees went into possession; that appellant herself was in possession on or about September 10, 1913, at which time respondent F. S. Langley wrongfully, unlawfully, and without her consent seized possession, which he still retains; that he has retained the purchase money paid by appellant, and that she is entitled to recover the same with interest.

Respondents, answering the complaint, denied that appellant had any interest in the mill; denied that she was in possession thereof at any time; denied any knowledge on their part that she had advanced any of the purchase money; and alleged that they sold the mill, by a written conditional bill of sale, to J. H. Weber alone; that respondents contracted with no other person; that the mill was personal property located on leased ground; that Weber defaulted in his payments; that respondent F. S. Langley thereupon instituted an action in replevin in the district court of Kootenai county, Idaho, to recover possession of the mill, and that final judgment was entered in his favor. Attached to the answer is a copy of the written contract of sale running from F. S. Langley to Weber alone, no mention of appellant or her husband being made therein.

The controlling issues are whether the mill was sold to Weber alone, or to appellant, her husband and Weber; also, whether respondents, at any time before they regained possession of the mill by the action in replevin, knew that appel-

lant had any interest therein, or had made any payment towards its purchase. After hearing the evidence, the trial judge found that, on or about September 25, 1913, respondent, by written contract, sold the mill to Weber; that Weber defaulted in his payments; that thereupon respondent F. S. Langley, in an action prosecuted in Kootenai county, Idaho, rightfully and regularly regained possession; that respondents had no dealings with appellant; that they had no means of knowing that appellant claimed any interest in the mill or had advanced any purchase money, and that if she did advance the same, as she testified, that fact was unknown to respondents. From an examination of the evidence, although there is some conflict, we conclude that it clearly preponderates in respondents' favor and sustains the findings, which in turn support the judgment.

As the written contract of sale from respondent F. S. Langley to Weber contained no provision for a forfeiture for non-payment of purchase money, appellant claims that respondent F. S. Langley was not entitled to bring an action in replevin to regain possession; that he should have proceeded by foreclosure, and that appellant, as a party in interest, should have been made a party defendant. The Idaho court had jurisdiction of the subject-matter of the action as well as jurisdiction of the person of Weber, the only vendee named in the contract. Its judgment, which cannot be attacked collaterally, is sufficient to protect respondents in their present possession. Even though error may have occurred during the trial of the action, that fact will not avoid the judgment. Affirmed.

MORRIS, C. J., FULLERTON, ELLIS, and MAIN, JJ., concur.

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[No. 11986. *En Banc*. July 22, 1915.]

SIBBIE P. PAYSSE *et al.*, Plaintiffs, v. MATTIE T. PAYSSE,
Defendant.¹

TRUSTS—CREATION—RESULTING TRUSTS. Where a wife's one-half interest in community property was devised to her husband for life or until he remarries, the remainder to her sons, upon his remarriage, lands purchased by him with funds derived from the community estate are held in trust for the sons.

TRUSTS—CONVEYANCE BY TRUSTEE—GIFT—RIGHTS OF DONEE. Where an undivided half interest in lands was held in trust for the sons of the title holder, his deed of gift of the lands to his wife entitles her only to his one-half interest, the other half being impressed with the trust; since the wife paid no valuable consideration and there is no element of estoppel in her favor.

Cross-appeals from a judgment of the superior court for King county, Smith, J., entered February 7, 1914, in favor of the plaintiffs, in an action for partition, and to vacate a deed, tried to the court. Affirmed.

Tucker & Hyland, for plaintiffs.

Reed & Hardman and *Hughes, McMicken, Dovell & Ramsey*, for defendant.

PARKER, J.—The plaintiffs, Sibbie and Alexis Paysse, seek to be decreed the owners of an undivided five-sixths' interest in a number of lots in the city of Seattle, and a tract of land in King county, as against the claims of the defendant, Mattie T. Paysse, their stepmother. A trial was had in the superior court, resulting in a decree which, for our present purpose, may be regarded as awarding to the plaintiffs an undivided five-sixths' interest in all of the lots and an undivided one-half interest in the land. A somewhat different disposition was made of five of the lots, which we think may be disregarded here. From this disposition of the cause, both the plaintiffs and the defendant have appealed to this court.

¹Reported in 150 Pac. 622.

The plaintiffs rest their claimed right to the property upon the theory that it is all the community property, or rather the product of the community property, of their deceased mother and father; claiming an undivided one-half interest under the will of their mother devising to them her one-half community interest, and claiming an undivided two-thirds of their father's one-half community interest, by inheritance from him; making in all the undivided five-sixths' interest claimed by them.

The defendant claims to be the absolute owner of the land by virtue of a deed of conveyance to her from her deceased husband, the father of the plaintiffs, upon the theory that the land was, at the time of the conveyance, his separate property, or the community property of himself and the defendant; and claims an undivided interest in the lots upon the theory that they were, at the time of her husband's death, the community property of herself and husband, or were in any event the separate property of her husband, resulting in her interest therein at the time of his death, he dying intestate, being greater than a one-sixth.

Sylvan Paysse came to Seattle about the year 1889, bringing his family, consisting of his wife, Mary Paysse, and their two small boys, these plaintiffs, who are the only children they ever had. During the years following, up until 1903, Sylvan Paysse and his wife accumulated considerable property. We think it plain from the record that in 1903 all of the property he possessed was the community property of himself and wife, Mary Paysse, who died in September, 1903, leaving a nonintervention will devising her interest in the community property, except a small portion thereof specifically devised, as follows:

"All the rest, residue and remainder of my property, whether real, personal or mixed, and wheresoever situated, I give, devise and bequeath to my said husband, Sylvan Paysse, for life only, however, and while he remains unmarried, and upon his death, or in case of his marriage, it is my will that

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the title to all of said property so willed to him shall immediately vest in my two sons, Alexis Paysse and S. P. P. Paysse, share and share alike, free and clear from any and all claims of my said husband. It being my intention to give to my said husband the use and profit of said property during his lifetime, unless he should remarry."

Executors were appointed and settlement of the estate provided for in the will as follows:

"I hereby nominate and appoint, as the executors of this my last will and testament my husband, Sylvan Paysse, and my two sons, Alexis Paysse and S. P. P. Paysse, and direct that they execute their trust without the intervention of any court."

Proceedings were had in the superior court for King county so far as was necessary to prove and establish the will, file an inventory, and give notice to and protect the rights of creditors, in pursuance of Rem. & Bal. Code, § 1444 (P. C. 409 § 283). In October, 1904, at the expiration of the year for the presentation of creditors' claims, upon a showing of no claims having been presented, an order was entered distributing the property, substantially in the language of the will, with no specific or even general description of the property passing to Sylvan Paysse and his sons under the residuary clause of the will above quoted. While the plaintiffs were named in the will as executors with their father, they deferred wholly to him the taking of such court proceedings as were necessary, and also the entire management of the property of the estate both before and after the court's order of distribution. At the time of the order of distribution in 1904, the plaintiffs were twenty-four and twenty-eight years old, respectively. It is true they signed the inventory and other court papers with their father, as was necessary from time to time, but they did so by direction of their father, giving no thought or attention to the contents of the papers so signed, except that they were papers pertaining to the estate, because of confidence in their father and

out of deference to his judgment as to what was necessary in that behalf. Neither of the plaintiffs were ever present at the preparation of any of these papers, nor at the consultation of counsel touching the affairs of the estate. The total value of the estate, as shown by the inventory and appraisement so filed, was \$3,435.

At the time of the death of Mary Payssé, there was personal property belonging to the community estate of the approximate value of \$10,000, which was not included in the inventory and appraisement. About half of this omitted property was in the form of certificates evidencing bank deposits, the existence of which was unknown to the plaintiffs until near the time of the commencement of this action, and about one-half was in the form of a grocery business and stock of goods which the plaintiffs claimed some interest in as partners. For some seven or eight years prior to the death of Mary Payssé, the plaintiffs had assisted in the running of this business. Indeed, it had during those years been built up from quite a small business to one of considerable proportions, largely through the individual efforts of the plaintiffs. There was, however, no written evidence of the plaintiffs having any partnership interest therein, though the manner in which it was conducted does in some degree point to a partnership interest therein by the plaintiffs. This, however, is of but little consequence here, except possibly as excusing, with other circumstances, the neglect of the plaintiffs in their omission of it from the inventory, in so far as such omission may be attributed to their neglect. Plainly their neglect did not cause the omissions of the bank deposits from the inventory, since they had no knowledge thereof. In the fall of 1904, about a year after the death of their mother, their father sold the grocery business and stock of goods, receiving therefor some four or five thousand dollars.

In May, 1905, Sylvan Payssé married Alice Cowan; thus putting an end to his life estate and all his interest in the

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one-half of the community property with which his former wife, Mary Paysse, had died seized, and which she had devised to her sons, the plaintiffs, subject to the defeasible life estate devised to her husband, Sylvan Paysse, as above noticed. This marriage was thereafter terminated by a decree of divorce. Thereafter, in 1908, Sylvan Paysse married the defendant, Mattie T. Paysse. On November 15, 1912, Sylvan Paysse conveyed by deed to Mattie T. Paysse the tract of land here involved, which he had theretofore acquired, as we have concluded, with funds derived from the community estate of himself and Mary Paysse, and which funds he held in trust for himself and his sons, the plaintiffs. This deed of conveyance is sought to be set aside by the plaintiffs as being obtained by fraud and undue influence on the part of the defendant rendering it void, to the end that the plaintiffs may be decreed the owners by inheritance of two-thirds of their father's one-half community interest therein by virtue of their mother's will and the trust resulting from the manner of acquiring the land by their father.

As we view this controversy, there is little else here involved than questions of fact. The record of the evidence is very voluminous. Even the ingenuity of learned counsel has not been able to abstract it within the space of less than about two hundred pages of typewriting. We have read it all as given in the abstract and much of it from the original statement of facts. We do not feel called upon to review the evidence here. To do so would serve no good purpose. It is sufficient, we think, to state only our conclusions therefrom.

It is contended by counsel for the plaintiffs that the trial court erred in refusing to set aside the deed for the land given by Sylvan Paysse to the defendant, Mattie T. Paysse, on November 15, 1912, upon the ground of fraud and undue influence practiced by her in procuring it. We agree with the conclusion reached by the trial court upon this question, from which it follows that that conveyance vested in the defendant

as her separate property the undivided one-half interest therein, then possessed by Sylvan Paysse.

It is contended by counsel for the defendant that the trial court erred in deciding, as it did in effect, that the evidence warrants the conclusion that the land and lots here involved were purchased and paid for by Sylvan Paysse with funds emanating and traceable from the community property of himself and former wife, Mary Paysse, and that such funds were held by him in trust for himself and his sons, the plaintiffs, he being entitled to one-half and the sons entitled to one-half thereof. We agree with the trial court's conclusion upon this question of fact, from which we think the trust follows. We may further observe that it is plain that the defendant received conveyance of the land as a gift from her husband, Sylvan Paysse, without paying any valuable consideration therefor. She therefore received by that conveyance only the interest he then had in the land. There is no element of estoppel which works in her favor to the detriment of the equitable title of the plaintiffs to an undivided half interest in the land, the legal title to which we think was acquired and held in trust by Sylvan Paysse for his sons, the plaintiffs. The law applicable to the facts of this branch of the case is well stated in 3 Pomeroy's Equity Jurisprudence (3d ed.), § 1048, as follows:

"Wherever property, real or personal, which is already impressed with or subject to a trust of any kind, express or by operation of law, is conveyed or transferred by the trustee, not in the course of executing and carrying into effect the terms of an express trust, or devolves from a trustee to a third person, who is a mere volunteer, or who is a purchaser with actual or constructive notice of the trust, then the rule is universal that such heir, devisee, successor, or other voluntary transferee, or such purchaser with notice, acquires and holds the property subject to the same trust which before existed, and becomes himself a trustee for the original beneficiary. Equity impresses the trust upon the property in the hands of the transferee or purchaser, compels him to perform the trust if it be active, and to hold the property subject to

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the trust, and renders him liable to all the remedies which may be proper for enforcing the rights of the beneficiary. It is not necessary that such transferee or purchaser should be guilty of positive fraud, or should actually intend a violation of the trust obligation; it is sufficient that he acquires property upon which a trust is in fact impressed, and that he is not a *bona fide* purchaser for a valuable consideration and without notice. This universal rule forms the protection and safeguard of the rights of beneficiaries in all kinds of trust; it enables them to follow trust property—lands, chattels, funds of securities, and even of money—as long as it can be identified, into the hands of all subsequent holders who are not in the position of *bona fide* purchasers for value and without notice; it furnishes all these distinctively equitable remedies which are so much more efficient in securing the beneficiary's rights than the mere pecuniary recoveries of the law."

Some contention is made by counsel for the defendant rested upon the theory that since Sylvan Paysse was demised a life estate by the residuary clause of the will of his wife, Mary Paysse, he thereby became entitled to the use, even to the extent of consumption, of the personal property so devised to him; and that in any event he was accountable only for the property or the proceeds thereof without increase or interest at the time of his remarriage in May, 1905. The answer to counsel's contentions, in so far as they rest upon this theory, is found in the fact that at that time he had this community property and money or the proceeds thereof, which ultimately became the purchase price of the land and lots here involved. We think the awarding to the plaintiffs of an undivided one-half interest in this property at this time does not result in their acquiring any benefit of profits or income which their father, Sylvan Paysse, might have been entitled to by virtue of his life estate prior to its termination upon his remarriage in May, 1905. Indeed, the evidence warrants the conclusion that there were no profits or income from this property prior to that time.

We are of the opinion that the plaintiffs are the equitable owners of an undivided one-half interest in the lots and land by virtue of their mother's will and the trust resulting from the acquisition of the land by their father, Sylvan Paysse, with funds traceable from the community estate of himself and former wife, Mary Paysse; and that the plaintiffs are also the owners of an undivided two-thirds of their father's undivided one-half interest in the lots, of which he died seized as his separate property, by inheritance from him under Rem. & Bal. Code § 1341 (P. C. 409 § 637). This is the result of and evidently the theory upon which the trial court rendered its decision.

The judgment is affirmed. Both appeals being unsuccessful, neither party will recover costs in this court.

MORRIS, C. J., HOLCOMB, FULLERTON, ELLIS, and MAIN, JJ., concur.

[No. 12295. Department One. July 22, 1915.]

J. A. CAUGHREN *et al.*, *Appellants*, v. B. KAHAN *et al.*,
Respondents.¹

TRIAL—PROVINCE OF COURT AND JURY—DIRECTING VERDICT OR JUDGMENT. A directed verdict, or judgment notwithstanding the verdict, can only be granted where the court can say, as a matter of law, that there is neither evidence, nor reasonable inference from evidence, to sustain the verdict of the jury.

PRINCIPAL AND AGENT—AUTHORITY OF AGENT—IMPLIED AUTHORITY—EVIDENCE—SUFFICIENCY. The evidence warrants a finding that an agent and bookkeeper of a firm of railroad contractors had implied authority to sell scrap iron, where it appears that he had repeatedly sold scrap iron from his employer's yards to the same purchaser, who on one occasion had been authorized to negotiate with the agent therefor; and it is immaterial that the agent absconded without accounting for the proceeds.

TRIAL—INSTRUCTIONS—"PREPONDERANCE OF EVIDENCE." It is not error to instruct as to the preponderance of the evidence, that what is meant is the best evidence—that which appeals to the jurors' in-

¹Reported in 150 Pac. 445.

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telligence as being the most probable, and as establishing certain facts.

PRINCIPAL AND AGENT—AUTHORITY OF AGENT—EVIDENCE—CUSTOM. Upon an issue as to the authority of an agent and bookkeeper for railroad contractors to sell scrap iron, it is not admissible to prove a custom or usage in that city for railroad contractors generally to have a man in charge of the office authorized to sell and dispose of such material; in view of the fact that the contractors were not merchants or engaged in trade.

PRINCIPAL AND AGENT—AUTHORITY OF AGENT—IMPLIED AUTHORITY—INSTRUCTIONS. Instructions, considered as a whole, held to properly state the rules relating to the apparent or implied authority of an agent of railroad contractors to sell scrap iron to one who had previously made purchases from such agent.

APPEAL—REVIEW—DISCRETION—NEW TRIAL. The discretion of the trial court in refusing to grant a new trial will not be disturbed on appeal, where there was some evidence and inferences from evidence sufficient to warrant the verdict.

Appeal from a judgment of the superior court for Spokane county, Sessions, J., entered January 2, 1914, upon the verdict of a jury rendered in favor of the defendants, in an action of replevin. Affirmed.

Voorhees & Canfield, for appellants.

Zent, Powell & Redfield, for respondents.

HOLCOMB, J.—In an action of replevin brought by appellants against the respondents, tried before a jury, the jury returned a verdict for the respondents and found the value of the property to be \$900. From a judgment entered thereon, this appeal is taken.

The property in controversy was a quantity of iron rails and scrap iron which had been theretofore used in the business of appellants. Appellants are a firm of railroad contractors having an office in Spokane, Washington. Mr. Caughren, one of the members of the firm, resides at Sauk Center, Minnesota. Woldson, the other member, resides in Spokane and is in general charge of the business of the firm. They have a warehouse and yards at Hillyard in which they

store such tools, rails, and appliances owned by them for use in their business of railroad construction as are not in actual use. One Dreifus was a dealer in second-hand machinery and hardware in Spokane. For about four years prior to March, 1913, one Rich had been employed by appellants as a book-keeper in their office in Spokane. In March, 1913, Rich attempted to sell to Dreifus a quantity of second-hand railroad iron. Dreifus was to pay \$800 for the iron, and resold to Kahan & Falk Company, defendants, for \$900. The authority of Rich, apparent or real, to make this sale was the principal issue at the trial.

Appellants insist that Dreifus' dealings were not with them, but were with Rich individually and not as agent. It was well established at the trial, and indeed there was no contention by Dreifus but that the property belonged to Caughren & Woldson, and unless the evidence is conclusive that neither real nor apparent authority has been conferred upon Rich as agent, or that the transaction was collusive between him and Dreifus, as principal and not as agent for appellants, the sale was not fraudulent and would pass the title to Dreifus and thence to respondents. It is conceded, of course, that the respondents obtained no better title than their vendor, Dreifus, had. The appellants contend that, because of certain writings made at the time of the transaction, viz., two checks made in favor of Rich individually by Dreifus, and one receipt to Dreifus signed by Rich individually, it is shown conclusively that Dreifus was dealing at the time with Rich individually and relying on Rich as his vendor; that, if he had dealt with Caughren & Woldson, he would have named them as payee in the checks, and he would likewise have taken their receipt for the purchase price instead of taking the receipt of Rich. It must be remembered that these writings were not such writings as are required by any statute, and are not conclusive evidence of the transaction or of the nature of the transaction.

Under the testimony introduced by respondents, it appears that, for about four years prior to March, 1913, Rich had

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been employed by appellants as their bookkeeper in their office at Spokane. About three years prior to March, 1913, Rich had undertaken to sell to Dreifus certain scrap iron, amounting in all to about twenty-five tons, for \$75. Rich then went with Dreifus to appellants' yards at Hillyard and directed the watchman, who was a brother of Martin Woldson, to deliver this scrap iron to Dreifus, which was done. Dreifus was engaged from that time for three weeks in hauling away from appellants' yards this scrap iron. Dreifus paid Rich the cash for this purchase. About a year after that transaction, Rich undertook to sell certain car wheels which had become useless for construction purposes, and directed the same watchman to deliver these car wheels to Dreifus at Hillyard. This was done, and the car wheels were loaded on a car at the yards and were shipped out by Dreifus. The agreed price between Rich and Dreifus was paid to Rich in cash. It appears also that, some three or four months previous to March, 1913, Dreifus went to the office of appellants and, for the first time, as he testified, saw and talked to Mr. Woldson. Woldson then asked Dreifus what his business was. Dreifus replied that he wanted to buy some forty-pound rails. Woldson replied: "I am busy; talk to Mr. Rich." Dreifus did talk to Rich about it, but no sale was made at that time. This is the only conversation which, according to Dreifus' testimony, he ever had with Mr. Woldson. This conversation is denied by Mr. Woldson, but, as appellants concede, under the intendment which follows the verdict of the jury, the facts are to be taken as above recited.

Early in March, 1913, Rich called on Dreifus at his place of business and talked with him about selling certain steel rails at Hillyard. They went together to Hillyard and looked at the rails. An agreement was reached between them by which Dreifus was to purchase 900 serviceable rails for \$800, and in addition thereto was to receive a number of bent rails which were to be paid for by him at four dollars per ton. Rich then directed the watchman at appellants' yards to load

out 900 steel rails, but told the watchman that the rails were for the use of Caughren & Woldson at Trinidad, a point in central Washington where they were doing railroad construction. Rich employed one Hawkes to load these rails on cars, and they were loaded on two flat cars at appellants' storage yards at Hillyard. They were billed out at Hillyard by the Great Northern Railway Company in the name of Caughren & Woldson, per Rich, as railroad contractors, denominating the shipment as contractors' supplies. They were billed to Caughren & Woldson at Spokane, and upon arrival at Spokane the freight was paid by Rich. Four hundred dollars of the purchase price was paid to Rich by Dreifus on March 18, and a check for \$400 given him, which was post-dated March 24. Dreifus had resold the goods to respondents for \$900, receiving \$800 of said sum. The goods were delivered to, and unloaded at, respondents' warehouse in Spokane on March 25. On about March 25th, Rich disappeared.

The appellants assign, among other errors, the following, which may be considered together: (1) That the court erred in refusing appellants' request for a peremptory instruction to the jury to find a verdict in favor of plaintiffs; and (2) that the court erred in denying the motion of appellants for a judgment *non obstante veredicto*.

If there were any fact or inference upon which the jury would be justified in finding a verdict in favor of respondents and against appellants, neither the appellants' motion for a peremptory instruction to find in their favor, nor their motion after the verdict for a judgment *non obstante veredicto*, could be granted. As to the last motion, it has been repeatedly held by this court that it invokes no element of discretion. It invokes a purely judicial function of the trial court, and of this court on review. It can only be granted when the court can say, as a matter of law, that there is neither evidence, nor reasonable inference from evidence, sufficient to sustain the verdict. *Brown v. Walla Walla*, 76 Wash. 670, 136 Pac. 1166; *Forsyth v. Dow*, 81 Wash. 137, 142 Pac. 490.

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There is no implication to be derived from the evidence, as shown by the record in this case, that Dreifus believed, or had any reason to believe, that, in regard to the transaction in controversy, he was dealing with Rich as principal. The only question of fact to be determined under the evidence was whether or not Rich, as agent, had actual or apparent and implied authority to sell the goods to Dreifus. The fact of Rich's authority to sell his principal's goods was one not necessary to be determined by direct evidence, but might be inferred from certain other facts, as, for instance, the previous course of dealing between him and third persons. Appellants erroneously suppose that, because Dreifus testified that his dealings were with Rich, that he bought from Rich, that he paid Rich, and that he took a receipt from Rich, he was expressly dealing with Rich as principal. We do not so understand. The evidence shows that he knew that Caughren & Woldson were contractors for railroad construction; that they owned the yards from which he had previously and repeatedly bought old iron at Hillyard through Rich; that Rich was their bookkeeper in the Spokane office, and that one of the appellants as a principal had previously authorized Dreifus to negotiate for old iron with Rich. Upon these facts, if the jury believed his testimony, they were justified in inferring that Dreifus dealt with Rich as agent, and that, from the previous conduct of their business by appellants through Rich, he had apparent authority to sell the old iron. It is true that Rich never accounted to his principals for the proceeds of the sale, and that they were defrauded of the purchase price thereof; but it is a well-established principle of equity and justice that when one of two innocent persons must suffer by the fault of a third, the loss shall fall upon him who has enabled such third person to do the wrong. *Hall v. Hinks*, 21 Md. 406. We therefore think that the denials of the motions for instructed verdict and for judgment notwithstanding the verdict were proper.

The appellants' next assignments of error, numbered 3 and 4, relate to the giving of certain instructions and portions of instructions, the first defining the issues involved between the parties under the pleadings, the second defining preponderance of evidence, which we do not consider erroneous. Instruction No. 1 complained of, defining the issues, stated them as fairly to the appellants as was possible. The second, in defining the term "preponderance of evidence," defined it as follows:

"By the term 'preponderance of evidence' as I have used it in these instructions is meant the best evidence—that which appeals to your intelligence as jurors and as men and women versed in the ordinary affairs of life as being the most probable happening and being the most probable event. Now, the evidence which satisfies your mind on that score is always the best evidence; it is always the evidence that is entitled to your consideration, and that is what the law means when it uses this expression 'preponderance of evidence.' It means evidence of that character, evidence which appeals to your judgment and to your intelligence as establishing certain facts."

While this definition of preponderance of evidence may not be the best definition possible, we do not consider it erroneous. It is not, as appellants suppose, to be confused with the legal meaning of "legal best evidence," but only applies to that which the jury were told might be by them considered the best evidence.

The next assignment of error is in giving the first portion of an instruction numbered 3, relative to the consideration by the jury of proof of custom and usage of the business as evidence of the authority of the agent. This calls for more serious consideration than any of the other assignments of error. During the trial of the case, the respondents attempted to introduce proof that "it was the custom and usage of the people in this line of business generally to sell and dispose of the used material and waste about their yards, and that it was customary to have a man in charge of the office attend

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to that line of work; that he generally does it, and, as Mr. Dreifus had been in the habit of going about these offices and inquiring of the men at the office and doing business with them; and that that course of dealing is customary among the railroad contractors here in the city [Spokane]." Upon an objection to this offered evidence, the same was rejected. The instruction in question seems possibly to take cognizance of the very facts which were themselves rejected.

It seems to us, under the circumstances of this case, that the evidence was properly rejected. These appellants were not in any merchandise or vending business. They were railroad contracting builders. The conduct of their business sometimes, but not regularly, rendered advisable the sale of unused appliances and materials, such as were sold in this instance. The question whether or not they had expressly or apparently authorized any of their agents to sell this material was for the jury. The remainder of the instruction complained of, together with instruction No. 4, which follows it, properly instructed the jury how to judge of the authority of the agent Rich from the course of dealing permitted by the principals with third persons, and to determine whether or not he had apparent authority in the matter of the transaction in controversy. Had the appellants been merchants and their employee, Rich, a salesman, or had he been a selling agent of any kind for them, general custom and usage of the trade or business in which he was engaged would form part of his authority. Proof of such usage is admitted only when the agency has been first shown, and then not to enlarge the powers of the agent, but only to show the extent of the powers actually conferred. 31 Cyc. 1331.

It is encyclopedic law also that, as between the principal and the agent, the scope of the latter's authority is that authority which is actually conferred upon him by his principal, which may be limited by secret instructions and restrictions. Such instructions and restrictions do not affect third persons ignorant thereof, and as between principal and third persons,

the mutual rights and liabilities are governed by the apparent scope of the agent's authority, which is that authority which the principal has held the agent out as possessing, or which he has permitted the agent to represent that he possesses, and which the principal is estopped to deny. The apparent authority, so far as third persons are concerned, is the real authority, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no further obligation to inquire into the agent's actual authority. The authority must, however, have been actually apparent to the third person who, in order to avail himself of rights thereunder, must have dealt with the agent in reliance thereon in good faith and in the exercise of reasonable prudence, in which case the principal would be bound by acts of the agent performed in the usual and customary mode of doing such business, although he may have acted without, or in violation of, private instructions, where such acts are within the apparent scope of his authority. 31 Cyc. 1331-1333.

These principles were given to the jury in the remaining portion of instruction No. 3 complained of, and instruction No. 4, which is also complained of. But those instructions were correct, and it may be assumed that that portion of instruction No. 3 complained of referred to acts of the agent performed in the usual and customary mode of doing business by the appellants in disposing of their old and unused material, and not to the usual and customary mode of contractors generally in the city of Spokane, for the court had expressly excluded testimony of such character, of which the jury must have been well aware. There were no other conflicting instructions given by the court which might have tended to confuse the jury. In further instructions the court fully and clearly instructed the jury in line with appellants' theory that, if they found that Rich did not pretend to act as agent for appellants and that Dreifus dealt with him as principal, their verdict must be in favor of plaintiffs (instruction

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No. 5) ; that if they found in the transaction in controversy that Rich purported to act as agent for the plaintiffs, but further found that plaintiffs had never authorized him to make sale of their property, their verdict should be in favor of the plaintiffs. In this connection they were further instructed that the fact that plaintiffs employed Rich as bookkeeper would not imply any authority to sell the property of plaintiffs (instruction No. 6). They were further instructed that no act or conduct or declaration of any kind by Rich would prove any authority in him to sell plaintiffs' property, unless it was further found from the evidence that such acts or conduct or declarations were either actually known to and acquiesced in by the plaintiffs, or were of such a nature and character that a reasonably prudent person situated as plaintiffs were situated would have known of such acts, conduct or declarations prior to the time of the dealings between Rich and Dreifus (instruction No. 7). They were further instructed that, before they could find that Rich had authority to sell the property involved, they must either find that, before the transaction in controversy, plaintiffs expressly conferred such authority upon him, or that plaintiffs themselves did some affirmative act or acts, or knew, or as reasonably prudent men should have known, of the acts, conduct or declarations by Rich which amounted to an assertion of such authority, and failed to disaffirm the same (instruction No. 8). They were further instructed, in three separate instructions, that it was incumbent upon the defendants to show by a fair preponderance of the evidence that the conduct of Dreifus in dealing with Rich was such that a reasonably prudent man, situated as Dreifus was situated, acting with honesty and fairness, would not have known that Rich was acting fraudulently, or such that a reasonably prudent person so situated would have inquired as to the authority of Rich to make the same; and that if Dreifus, situated as he was, should have known or believed that the transaction was dishonest on the part of Rich and was made with fraudulent intent, then that Dreifus' pur-

chase would not deprive plaintiffs of their title; that Dreifus could obtain no title by such sale, and that defendants would have none. They were further instructed that the burden of proof was upon the defendants to establish the fact that Rich was the agent of plaintiffs and had authority to make the particular sale in question, and the honesty and good faith of such sale by a fair preponderance of the evidence. Upon these instructions as a whole, it seems clear that the appellants could not have been prejudiced by the giving of the portion of instruction No. 3 complained of, and that the jury could not have been misled thereby.

The last error relied upon by appellants is that the court erred in refusing a new trial and entering judgment on the verdict. The trial court heard and saw the witnesses and was familiar with all the evidence introduced at the trial, and exercised his discretion in denying the motion for a new trial. There is some evidence and inferences to be derived from the evidence which, if believed by the jury, were sufficient to warrant them in finding a verdict for the respondents. We do not feel justified, therefore, in interfering with the discretion exercised by the trial court in denying a new trial.

Finding no prejudicial error in the record, the judgment is affirmed.

MORRIS, C. J., MOUNT, and PARKER, JJ., concur.

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Statement of Case.

[No. 12356. Department Two. July 22, 1915.]

SPOKANE MERCHANTS' ASSOCIATION, *Appellant*, v. FIRST
NATIONAL BANK OF COLVILLE *et al.*, *Respondents*.¹

CHATTEL MORTGAGES—VALIDITY—FAILURE TO RECORD. A chattel mortgage which was not filed as required by law until ten months after the death of one of the mortgagors, at which time the property had passed to the administratrix, is void as to creditors.

SAME—VALIDITY—PERSONS ENTITLED TO ATTACK. Creditors who have not acquired a specific right to or lien upon mortgaged chattels cannot question the validity of the mortgage as between the parties thereto.

SAME. In view of Rem. & Bal. Code, § 1483, providing that a judgment against an administrator only establishes the claim, and does not create a lien upon the property of the estate, creditors whose claims have been allowed and established have no such right to, or lien upon, chattels mortgaged by the deceased as to be entitled to question the validity of the mortgage as between the parties thereto.

SAME—FORECLOSURE—TRANSFER. Upon a judgment of foreclosure, a chattel mortgage is merged in the judgment and has no further validity.

JUDGMENT—BAR—MOTION TO VACATE—COLLATERAL ATTACK. An order denying a motion to vacate a judgment is a bar to a subsequent proceeding by motion or independent action seeking the same relief; and the bar would be applicable to creditors of an estate who were not parties but had the right to appear in the action against the administratrix and move for the relief afterwards sought by them in an independent action.

FULLERTON, J., dissents.

Appeal from a judgment of the superior court for Stevens county, Sullivan, J., entered September 13, 1913, dismissing an action for equitable relief, tried to the court. Affirmed.

F. M. Goodwin, J. D. Campbell, and J. B. Campbell, for appellant.

Jesseph & Bourland and *F. Leo Grinstead*, for respondents.

¹Reported in 150 Pac. 434.

MAIN, J.—This was an action in equity, brought by the assignee of certain of the creditors of the estate of Victor M. Shick, deceased, for the purpose of having set aside a judgment foreclosing two chattel mortgages and declaring the mortgages void as to creditors, and restraining the plaintiff in the mortgage foreclosure action from selling the property under the judgment. After the issues were framed, the cause in due time was tried before the court sitting without a jury, and resulted in a judgment dismissing the action. From this judgment, the plaintiff appeals.

The pertinent facts are substantially as follows: On the 22d day of December, 1910, and for some time prior thereto, Victor M. Shick and C. F. Kahl were partners engaged in the hardware business in the town of Addy, Stevens county, Washington, under the firm name and style of Addy Hardware Company. On the date mentioned, the partnership borrowed from the First National Bank of Colville, Washington, the sum of \$1,100, giving its promissory note due in four months; and on the same date borrowed of the same bank the sum of \$1,200, evidenced by a promissory note due in six months after date. These notes were secured by chattel mortgages covering the stock of hardware, furniture, implements, etc., and "other personal property belonging to the Addy Hardware Company."

On April 14th, 1911, Victor M. Shick, a member of the partnership, died intestate. On the 16th day of May, 1911, Mary Shick, the wife of Victor M. Shick, deceased, was appointed administratrix of his estate, no application having been made previously by the surviving partner for letters of administration upon the partnership property. The chattel mortgages dated December 22, 1910, were not recorded until February 21, 1912. On February 21, 1912, the First National Bank of Colville began an action to foreclose the mortgages, making Mary Shick a party thereto as an individual, and as administratrix of the estate of her deceased husband; and also making C. F. Kahl, the surviving member of the part-

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nership, a party to the action. On February 27, 1912, Mary Shick and C. F. Kahl answered in the action to foreclose the mortgages, and admitted all of the allegations of the complaint. The answer was filed on March 5, 1912, and a decree of foreclosure was entered on March 6, 1912. On March 9, 1912, the Spokane Merchants' Association, a corporation, as assignee of certain creditors of the Addy Hardware Company, filed a motion to vacate and set aside the judgment of foreclosure of March 6, 1912, and for leave to intervene and defend. These motions were denied on March 21, 1912. No appeal was prosecuted by the Spokane Merchants' Association from the order overruling and denying its motion to vacate and set aside the judgment foreclosing the chattel mortgages. On March 28, 1912, this action was commenced by the Spokane Merchants' Association for the purposes already indicated.

A considerable portion of the appellant's brief is devoted to argument and the citation of authorities to sustain its contention that the mortgages were void as to creditors. Without reviewing this argument, it may be said that there can be little doubt but what the mortgages were void as to creditors of the estate of Victor M. Shick, deceased. The distinction between the facts in this case and those of the case of *Pacific Coast Biscuit Co. v. Perry*, 77 Wash. 352, 137 Pac. 483, is obvious. In that case the mortgage was not recorded until some time after it was executed; and it was held that the mortgage spoke and became valid from the date of its filing for record, the reason being that at the time the mortgagor had the power to make a new mortgage which would prefer a creditor. In this case, approximately ten months prior to the filing of the mortgages for record, the mortgagor had died. His property had passed to the administratrix, who held the same in trust for the creditors of the estate and the distributees. At the time the mortgage was filed for record, a new mortgage could not have been given which would have operated as a preference to any of the creditors.

But even though the mortgage is void as to creditors, it does not follow that the appellant can maintain this action. It is only creditors who have acquired some right to the specific property covered by the mortgage, or some form of lien thereon, that can question the right of the mortgagee to foreclose against the mortgaged property. *Heal v. Evans Creek Coal & Coke Co.*, 71 Wash. 225, 128 Pac. 211; *Watson v. First National Bank of Clarkston*, 82 Wash. 65, 143 Pac. 451. In the *Heal* case, it was said:

"Whether properly recorded or not, the mortgage was valid as between the mortgagor and mortgagee, and it is only creditors who have acquired some form of lien upon the mortgaged property that can question the right of the mortgagee to foreclose against such mortgaged property."

The appellant, as representing the creditors, had acquired no lien upon the property covered by the mortgage. The claims of creditors had been presented to the administratrix and allowed by her. This would not give them the standing of lien creditors. Under the statute, Rem. & Bal. Code, § 1483 (P. C. 409 § 361), even a judgment rendered against an administrator only establishes the claim for the amount ascertained to be due, and does not "create a lien upon the property of the estate."

Assuming, however, that a creditor of an estate of a deceased person may question the validity of a chattel mortgage given by a deceased person during his lifetime to another creditor of the estate, the appellant is in no better position. By virtue of the judgment in the foreclosure proceeding, the mortgages became merged in the judgment. They have no further vitality so long as the judgment stands. 23 Cyc. 1108; 1 Black, Judgments, § 269.

After the judgment of foreclosure was entered, the appellant in that action filed a motion to vacate and set aside the judgment. This motion was denied, and no appeal prosecuted for the purpose of having the order of the trial court reviewed. Thereafter the present action was instituted. Be-

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fore the question as to the validity of the mortgages can be reached, it is necessary that the judgment be modified. It has become the settled law of this state, as evidenced by the repeated decisions of this court, that an order denying a motion to vacate a judgment is a bar to a subsequent proceeding, whether such subsequent proceeding be a motion or an independent action seeking the same relief. *Chezum v. Claypool*, 22 Wash. 498, 61 Pac. 157, 79 Am. St. 955; *McCord v. McCord*, 24 Wash. 529, 64 Pac. 748; *Pierce County v. Bunch*, 49 Wash. 599, 96 Pac. 164; *Newell v. Young*, 59 Wash. 286, 109 Pac. 801; *Flueck v. Pedigo*, 55 Wash. 646, 104 Pac. 1119; *Meisenheimer v. Meisenheimer*, 55 Wash. 32, 104 Pac. 159, 133 Am. St. 1005; *Kelley v. Sakai*, 72 Wash. 364, 130 Pac. 503.

This rule is recognized by the appellant. But it claims that, since neither it nor the creditors of which it is the assignee were parties to the foreclosure action, the rule is inapplicable. But it does not seem that this contention is well founded. The appellant would no doubt have the same right to appear in the original action and move to vacate the judgment as it would to prosecute an independent action for the same purpose. It is said, however, that the purpose of the motion and of the present action were not the same. It is true that the relief asked in the present action is somewhat broader than that sought by the motion. But before the relief prayed for in this action could be granted it would be necessary to modify the judgment, the very purpose for which the motion was filed. Had the appellant, instead of moving in the original action, filed a petition in the probate action asking a revocation of the letters of administration to the administratrix because she had failed in the performance of her duty in that she did not defend the foreclosure action, and requesting the appointment of another person as administrator so that such latter person might present a motion for the vacation of the judgment of foreclosure, and the cause were here for the purpose of reviewing the denial of the probate

court to grant such relief, a different question would be presented, upon which we express no opinion. Neither do we express any opinion upon the question as to whether the administratrix may be liable upon her bond for failure to defend the foreclosure action.

The judgment will be affirmed.

MORRIS, C. J., ELLIS, and CROW, JJ., concur.

FULLERTON, J. (dissenting)—I dissent. The mortgage, because not recorded during the lifetime of the mortgagor, never had any validity as against creditors. The facts, therefore, present a case where one creditor, with the consent or connivance of the administratrix of the estate, has taken the property of the estate to the exclusion of the other creditors. This act was wrongful, and I can see no reason why the injured creditors may not recover against the wrongdoer in this form of action.

[No. 12714. Department One. July 22, 1915.]

LILLY NELANDER BOUTIN, *Respondent*, v. NATIONAL
CASUALTY COMPANY, *Appellant*.¹

INSURANCE—ACCIDENT INSURANCE—POLICY—WAIVER OF CONDITIONS—ACCEPTANCE OF OVERDUE PREMIUMS. An accident policy did not lapse for failure of the insured to pay the premium monthly in advance, as required by the policy, where it appears that the insurance company employed a collector who for three years had called on the first day of the month or shortly thereafter and collected and receipted for the premiums; that the money was always ready for him when he called, and was ready on the first day of the last month, but the collector did not call for it until the third of the month, the insured having died the day before; since a course of conduct had been established upon which the insured had a right to rely.

Appeal from a judgment of the superior court for King county, Smith, J., entered December 18, 1914, upon the

¹Reported in 150 Pac. 449.

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verdict of a jury rendered in favor of the plaintiff by direction of the court, in an action on an insurance policy. Affirmed.

Edward Judd and Victor M. Place, for appellant.

Elias A. Wright and Sam A. Wright, for respondent.

MOUNT, J.—This action was brought to recover upon an insurance policy. The case was tried to the court and a jury. There was no dispute upon the facts, and the court, at the conclusion of the evidence, directed a verdict in favor of the plaintiff. Thereafter a judgment was entered in accordance with the verdict. The defendant has appealed.

The facts are as follows: On the 30th day of March, 1910, the appellant issued to one Henry Nelander its policy of insurance, which provided that, in case of death by accident, the beneficiary should receive the sum of \$500, together with an additional ten per cent in case the premiums had all been paid for one year immediately preceding the occurrence of the loss. The beneficiary named in the policy was Nelander's daughter, the respondent in this case.

The policy provided that the insurance company,

"Does hereby insure the person described in said application, subject to the provisions and conditions herein contained and endorsed hereon, from 12 o'clock noon (Pacific) Standard Time, of the day this contract is dated, until 12 o'clock noon, Standard Time, of the first day of May, 1910, and for such further monthly periods, stated in the renewal receipts, as the payment of the premium specified in said application will maintain this policy and insurance in force."

Upon the face of the application is a recitation as follows:

"Will pay premiums to Seattle office. Monthly premium \$1.70, which I agree to pay in advance without notice."

On the back of the policy is a statement as follows:

"If the payment of any renewal premium shall be made after the expiration of this policy, or of the last renewal receipt, neither the assured nor the beneficiary will be en-

titled to indemnity for any accidental injury happening between the date of such expiration and noon (Standard Time) of the day following the date of the receipt of such renewal payment at the home office; nor for any illness originating before the expiration of thirty days after the date of such renewal payment. The acceptance of any renewal premium shall be optional with the company."

At the time the policy was delivered, a receipt book was left with the policy holder, which book contained blank spaces for the payment of premiums and for the signature of the collector. On the back of this little book was a notice stating:

"Premiums are payable in advance, without notice. If you wish to be in good standing you must at all times pay promptly on or before the first day of each month as specified in policy, as the company will not pay benefits for disability commencing when the premiums are unpaid.

"Premiums should be paid only to the duly authorized collector, or at the home office, and if you pay otherwise, you do so at your own risk and must stand the loss, if any."

On the face of this book is a statement as follows:

"This book must always be presented to local collector for signature when paying premiums. If he cannot be found, send your premiums with this book to the home office at Detroit, Mich."

In Seattle, where the insured lived, the company maintained a local collector, who made it a practice each month to call at the home of the insured and receive the premiums. When he received a premium he would indorse the same upon the book above referred to, and sign a receipt upon the book. The premiums had been paid upon this policy for a period of three years. They were regularly indorsed upon the book. Twenty-one of these appear to have been made upon the first day of the month; five appear to have been made upon the second day of the month; two upon the third of the month; two on the fourth of the month; one upon the fifth; one upon the eleventh; one upon the twelfth; and one upon

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the 13th of the month. Two entries appear to have been the collection of two months' premiums at one time; the day of the month is not shown. This book was retained by the beneficiary in her possession; and the collector testified that when he called for the premiums the money was always ready for him; that he called for premiums at his convenience. The evidence shows that it was the custom of the beneficiary, during the latter part of the month before the premium became due, to always have the money ready, which she placed in a receptacle, awaiting the call of the collector for it.

On October 1, 1913, the premium was paid as usual on the first day of the month. The first day of November, 1913, fell upon a Saturday. The money was ready for the collector at that time, but he did not appear. On the second day of November, 1913, the insured died from an accident which was covered by the policy. On the next day, November 3, the collector called for the premium, when he was informed that the insured had died the day before. The collector receipted the book, but refused to take the money, saying that he would report the matter to the company and if it was all right he would then take the money. He did report the matter to the company, and the company refused to receive the premium, and denied liability upon the policy. This action was thereupon brought.

This case is controlled by the case of *Morgan v. Northwestern Nat. Life Ins. Co.*, 42 Wash. 10, 84 Pac. 412, which was similar to the case now under consideration, and where an instruction to the jury was approved to the effect that if the jury found that, by a course of dealing, a prudent person was led to believe, and did believe, that she was making payments according to the terms of a policy and that she so understood; that the custom and conduct of the company in receiving the payments without objection were calculated to lead an ordinarily prudent person to understand and believe that she was paying the premiums in accordance with the provisions of the policy, that in such case the plaintiff

was entitled to recover. A number of cases are there considered, and at the close of the opinion we there said:

"It was held in *Hartford etc. Ins. Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. 671, 36 L. Ed. 496, that a life insurance company, whose policy provides for the payment of premiums at stated times, and further that the holder agrees and accepts the same upon the express condition that, if the monthly dues are not paid to said company on the day due, then the certificate shall be null and void and of no effect, may nevertheless, by its whole course of dealing with the assured, and by accepting payments of overdue sums without inquiries as to his health, give him a right to believe that the question of his health would not be considered, and that the company would be willing to take his money shortly after it had become due, and such a course of dealing may amount to a waiver of the conditions of forfeiture. To the principles announced in those cases, we unhesitatingly give our indorsement."

The same is true in this case. While the insurance was from month to month as the premiums were paid, there was no dispute of the fact that the insurance company had employed a collector to collect the premiums upon this policy, and many other policies of the same kind in that neighborhood; and that it was his custom to apply to the policy holders on the first of the month, or within a few days thereafter, and collect the premiums thereon. This was such a course of conduct as would lead an ordinarily prudent person to believe that the company was not standing strictly upon the provisions of the policy that the premium must be paid upon the first of the month. The fact is not disputed that the beneficiary in this case was always ready with the money for the premium which was due upon the first of the month. She waited for the collector to appear and receive the money. The collector, for a period of three years, had made it a custom to call upon the first of the month, or soon thereafter, and receive the money. It is plain, it seems to us, that this established a course of conduct upon which the assured and the beneficiary had a right to rely. If the collector who was em-

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ployed by the insurance company neglected to call upon the first of the month and receive the premium, it was his fault and not the fault of the beneficiary or the assured. To hold under these circumstances that the policy had lapsed would, we think, amount to a great miscarriage of justice.

The appellant relies for reversal upon the case of *Popovitz v. United States Health & Accident Ins. Co.*, 78 Misc. Rep. 148, 137 N. Y. Supp. 788. It does not appear from the opinion in that case that any course of conduct outside the strict terms of the policy had been established by the company. It does appear that the monthly premiums were not paid when they were due. It may be conceded that, if, through the fault of the insured or the beneficiary under the policy, the premiums were not paid, the policy would lapse. But where the fault is the fault of the insurance company, and not the fault of the assured or the beneficiary, certainly the policy ought not to lapse. We think the *Popovitz* case is not controlling here.

The appellant also cites and relies upon the case of *Thompson v. Fidelity Mut. Life Ins. Co.*, 116 Tenn. 557, 92 S. W. 1098, 115 Am. St. 823, 6 L. R. A. (N. S.) 1039. That case is a well reasoned case, but the court in its opinion says:

"Under the above authorities, before complainant can recover in this case, she must show:

"(1) That the course of dealing between the insurer and the insured, in reference to the acceptance of overdue premiums, amounted to a custom or habit.

"(2) That by reason of this course of dealing, the insured was justified in believing that the company would not insist upon a forfeiture for his failure to pay his subsequent premiums *ad diem*.

"(3) That the insured did actually believe that he could postpone the payment of his future premiums after maturity without the risk of a forfeiture.

"(4) That the insured acted upon this belief in this instance, and that by reason thereof, did not pay the premium due December 30, 1904, at its maturity."

This rule applies precisely to the case now in hand. The course of dealing between the insurance company and the beneficiary clearly amounted to a custom and a habit. The beneficiary in this case was certainly justified in believing that the company would not insist on a forfeiture when its agent employed to make the collections failed to appear and receive the money at the proper time, especially when he knew the money was always ready and waiting for him on the first of the month. In this case the beneficiary did not postpone the payment of the premium, but was ready at all times to pay the same; and the failure to pay on the day it became due was the fault of the collecting agent and not the fault of the beneficiary. We think the two cases relied upon by the appellant do not control in this case, but that the case is controlled entirely by the rule in the *Morgan* case, *supra*.

The judgment is therefore affirmed.

MORRIS, C. J., CHADWICK, HOLCOMB, and PARKER, JJ., concur.

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[No. 12082. *En Banc*. July 23, 1915.]

CHEUSA PAICH, *Appellant*, v. NORTHERN PACIFIC RAILWAY
COMPANY, *Respondent*.¹

JUDGMENT—NOTWITHSTANDING VERDICT—TIME FOR ENTRY. After the entry of judgment upon the verdict of a jury, the supreme court is without power to entertain a motion for judgment notwithstanding the verdict, its power to correct its own errors being limited to the statutory right of granting a new trial.

SAME—ENTRY — CLERK'S JOURNAL — JUDGMENT NOTWITHSTANDING VERDICT—TIME FOR MOTION. Under Rem. & Bal. Code, § 431, providing that the clerk shall immediately enter judgment in conformity to the verdict, but that the granting of a new trial shall operate as a vacation of the judgment, the clerk's journal entry of judgment upon a verdict entered as of the date when the verdict was rendered, constitutes a valid judgment as of that date, notwithstanding that the entry was not actually made for several days, and that, meanwhile, a motion for a new trial and for judgment notwithstanding the verdict were made; hence such motion for judgment was too late, not having been made until after judgment on the verdict.

SAME—ENTRY — FORM — CLERK'S JOURNAL. The clerk's journal entry of judgment "in favor of plaintiff and against the defendant in accordance with the verdict," is sufficient in form to constitute a judgment where it immediately follows the journal entry of the verdict, which specified the amount of the recovery.

APPEAL—DECISION—REMAND. Where judgment notwithstanding the verdict was erroneously entered, and an accompanying motion for a new trial was overruled simply to clear the record without passing on its merits, on reversal, the cause will be remanded with directions to pass upon the motion for a new trial.

MORRIS, C. J., MOUNT, and CROW, JJ., dissenting.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered October 4, 1913, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee engaged in railroad construction work. Reversed.

Jay C. Allen and J. H. Allen, for appellant.

C. H. Winders, for respondent.

¹Reported in 150 Pac. 814.

ON REHEARING.

PARKER, J.—This cause is before us upon rehearing. It was disposed of in favor of respondent by the decision of Department One, rendered December 15, 1914, reported in 82 Wash. 581, 144 Pac. 919. Having considered the oral argument and briefs presented by counsel upon rehearing, we are led to the conclusion that the Department decision is erroneous, in that it affirmed the judgment notwithstanding the verdict rendered by the superior court, which judgment was based upon a motion made therefor by counsel for respondent after a judgment had been rendered in accordance with the verdict.

After reviewing the case upon the merits, the Department decision briefly disposes of the question of the power of the superior court to render the judgment notwithstanding the verdict as follows:

“Appellant submits the contention that the lower court was powerless to grant the judgment complained of. Respondent had challenged the sufficiency of the evidence, both at the conclusion of appellant’s case and at the conclusion of the whole case. Each of these motions was well taken and should have been granted. There is neither fact nor law upon which the verdict could stand. We are not disposed to say that the lower court is powerless to correct its own errors and that, having done so, its action is void. The granting of motions for judgment is proper when the court can say, as a matter of law, that there is neither fact nor reasonable inference to support the verdict.”

The fact that there was a previous judgment rendered in accordance with the verdict was not noticed in the Department decision as a fact affecting the court’s power to thereafter set aside such judgment and render a judgment notwithstanding the verdict and contrary thereto.

Assuming, for the present, that a judgment was in fact rendered in accordance with the verdict before respondent made its motion for judgment notwithstanding the verdict, our decisions lead only to the conclusion that the trial

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court's power was thereafter limited to the granting of a new trial. Indeed, if it were not for the statute giving to the trial court the power of granting new trials after judgment, even such power would not exist. The judgment rendered upon the verdict being the final determination of the rights of the parties, was the end of the case so far as the trial court was concerned, except only in so far as the statute provides otherwise. The view that the trial court should not be held powerless to correct its errors, as suggested by the language of the Department decision, must be taken with the qualification that such power to correct errors ceases to exist upon the rendering of a final judgment, except, as we have noticed, by the exercise of the statutory power to grant a new trial.

In *Wagner v. Northern Life Ins. Co.*, 70 Wash. 210, 126 Pac. 434, 44 L. R. A. (N. S.) 338, touching the power of a trial court in a case after judgment, we said:

"The respondent contends that the motion for judgment notwithstanding the verdict operated as a stay, and when granted vacated the first judgment just as the granting of a motion for a new trial does. The answer is obvious. The motion for a new trial operates as a stay simply because the statute expressly gives it that effect, and the granting of a motion for a new trial vacates the judgment only because the statute expressly so declares. Rem. & Bal. Code, § 431. We have no statute providing for a motion for judgment *non obstante veredicto* or giving either of these effects to such a motion. At common law it had no such effect, since it could not be interposed after entry of judgment. 23 Cyc. 781."

In *Auwarter v. Kroll*, 79 Wash. 179, 140 Pac. 326, it was held that the court's power after judgment was "limited to making an order granting a new trial." In *Forsyth v. Dow*, 81 Wash. 137, 142 Pac. 490, it was said:

"Nor does the statute make the motion in any way dependent upon or concurrent with a motion for a new trial. The only right to move after the entry of a judgment is the

had not been filed so as to become a part of the court records. At page 403, it was said:

"It is probable that, if the clerk had either filed or entered the order in his journal the order would then have passed beyond the control of the court, except to vacate or modify the same under the statute with reference thereto. But where the same had only been delivered to the clerk, who had not filed it, and no entry thereof was made by him, the court had authority, under the statute above quoted, to direct when it should be entered, or to direct that it should not be entered at all."

It is true that the judgment rendered upon the verdict in this case was not signed by the judge nor was it filed by the clerk, but it was actually recorded in full in the minutes kept by the clerk under the direction of the court. This would seem to give it all the force of a signed and filed judgment, though not actually recorded in the journal. However, we do not rest our conclusion entirely upon this ground, since we have a statute later than that above quoted relating to the duty of the clerk to record judgments in the journal. Rem. & Bal. Code, § 431, Laws of 1903, page 285, reads:

"When a trial by jury has been had, judgment shall be entered by the clerk immediately in conformity to the verdict, . . . provided, further, that the granting of a motion for a new trial shall immediately operate as the vacation and setting aside of said judgment."

In *Forsyth v. Dow*, 81 Wash. 137, 142 Pac. 490, considering the effect of this provision, it was said:

"While the rendition of a judgment is a judicial function, its entry is a ministerial act, and as verdicts are received by the court, the legislature violated no provision of our constitution when it provided that the clerk should enter judgment on the verdict when it is returned. Unless the judge reserves judgment or directs that it be not entered, judgment should be entered at once. It is rendered when the verdict is pronounced by or in the presence of the court. If this is not the true construction of the statute, it is impractical and could be defeated at will."

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We are of the opinion that, in the light of this later statute and our former decisions, the entry of the judgment in the minutes of the court, though not recorded in the journal until some time thereafter, was in effect a rendering of a judgment upon the verdict.

It is contended by counsel for respondent that the entry made by the clerk in the minutes of the court is not sufficient in form to constitute a judgment. It is to be noted that the verdict itself is embodied in the judgment, and the language following, to the effect that "judgment is hereby entered in favor of the plaintiff and against the defendant in accordance with the verdict," we think, renders it just as certain as to the amount that the judgment is for as if the amount stated in the verdict were repeated in the concluding language of the judgment. We think that it can hardly be seriously contended that the judgment is uncertain in any other respect. Observations made by the court in *Forsyth v. Dow, supra*, support this conclusion. The decision of Department One is overruled. The judgment notwithstanding the verdict, which also set aside the former judgment, is reversed.

It appears from the record before us that, at the time respondent made its motion for judgment notwithstanding the verdict, it also made a motion for a new trial, which was plainly intended to be urged in the event the motion for judgment notwithstanding the verdict should be denied. When the court granted the motion for judgment notwithstanding the verdict, it, on the same day, denied respondent's motion for a new trial and entered its order accordingly. It is apparent that this order was made by the court merely for the purpose of clearing the record of the motion for a new trial; plainly the motion was not disposed of upon the merits. To reverse that judgment without at the same time vacating the order denying respondent's motion for a new trial would in effect deprive it of the benefit of that motion if

it be well founded. We therefore conclude that the order denying the motion for a new trial be vacated, and that the cause be remanded to the trial court for further proceedings without prejudice to respondent's right to urge and have disposed of upon the merits its motion for a new trial. It is so ordered.

CHADWICK, MAIN, HOLCOMB, FULLERTON, and ELLIS, JJ.,
concur.

MORRIS, C. J. (dissenting)—I am unable to concur in the decision reached by the majority. It cannot be denied, since we have no statutory provision, that the practice regulating the making of motions for judgment notwithstanding the verdict must follow the common law procedure. It must also be conceded that, at common law, such motions must precede the signing and entry of final judgment. If we are to adopt the common law procedure as applied to motions of this character, then we should adopt it as a whole, and not separate it from the essential features of a common law judgment requiring the formal judicial act of the court, signature and entry, before becoming effective. The majority adopt the common law requirement that the motion must precede the judgment, but in determining the character of the judgment, they leave out the common law requirement of formality and substitute the statutory judgment, which is nothing more than the ministerial act of the clerk possessing few, if any, of the common law requirements of a formal judgment. It seems to me it would be better to hold that the motion must be made as at common law, must precede a signed and entered formal judgment as at common law, and that the motion is in time when it precedes such a judgment.

This has been the procedure in this state since *Roe v. Standard Furniture Co.*, 41 Wash. 546, 83 Pac. 1109. In referring to a motion of this character, it was especially pointed out in *Wagner v. Northern Life Ins. Co.*, 75 Wash. 106, 134 Pac. 685, that the motion there made followed the

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signing and entry of formal judgment, and that the judgment there referred to was not the one which the clerk is directed to enter upon receipt of the verdict. It is also clearly pointed out in *Okazaki v. Sussman*, 79 Wash. 622, 140 Pac. 904, that the judgment there was a formal judgment signed by the judge and entered of record. The direction to the clerk to enter judgment immediately upon receipt of the verdict was to preserve the rights of a successful party in the fruits of his judgment. It was not intended, however, to cut off the rights otherwise vested in the losing party of moving against the judgment for insufficiency in law or fact.

I therefore dissent, and since my views call for an affirmation of the judgment, I express no opinion as to the other matters referred to in the majority opinion.

MOUNT and CROW, JJ., concur with MORRIS, C. J.

[No. 12597. Department One. July 24, 1915.]

EDWARD S. WILDY, *Appellant*, v. C. C. HENRY *et al.*,
Respondents.¹

TAXATION—PUBLIC LANDS—RIGHT TO PATENT—CONDITIONS PRECEDENT—EQUITABLE TITLE. No equitable title passes to a purchaser of government lots in the townsite of Port Angeles upon his paying the price and taking receipt therefor, until after performance of the condition precedent relating to improvements, and until then the lots are not subject to taxation; under 34 U. S. Stat. at L., ch. 2077, p. 167, which provides that no patent shall issue to any lot until the purchaser has proven to the satisfaction of the secretary of the interior that he has expended \$300 in permanent improvements on each lot purchased.

Appeal from a judgment of the superior court for Clallam county, Ralston, J., entered October 20, 1914, upon sustaining a demurrer to the complaint, dismissing an action to vacate a tax sale, tried to the court. Reversed.

¹Reported in 150 Pac. 620.

Geo. Venable Smith, for appellant.

Cochran & Plummer, for respondents.

CHADWICK, J.—In the year 1907, plaintiff purchased government suburban lot No. 132, in the townsite of Port Angeles. His entry was made at the United States land office at Seattle.

Under the terms of the act under which the lot was sold, patent is not due until improvements to a certain value have been made by the purchaser. A copy of the act follows:

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed to cause the reappraisement of all unsold and undisposed of suburban lots not reserved for public purposes in the townsite of Port Angeles, Washington, and all of said lots so reappraised to be subject to sale at private entry only at such reappraised price: Provided, That no patent shall issue to any of the lots so reappraised until the purchaser thereof has proven to the satisfaction of the Secretary of the Interior that he has expended not less than three hundred dollars in permanent improvements on each lot purchased by him.” 34 U. S. Stat. at Large, ch. 2077, p. 167.

Plaintiff paid the purchase price, taking a receipt therefor.

In the year 1908, the taxing officers of Clallam county, proceeding upon the theory that the payment of the purchase price vested the equitable title in the purchaser, assessed the lot and it was thereafter sold to defendants at tax sale. This action was brought to set aside the tax sale and treasurer's deed given in pursuance thereof. From a judgment in favor of the defendants, plaintiff has appealed.

This court, in common with others, has held that an equitable interest in real property is a subject of taxation, and that government land held under final receiver's receipt is subject to taxation. *Hawmesser v. Chehalis County*, 76 Wash. 570, 136 Pac. 1141; *Flood v. Virnig*, 79 Wash. 417,

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140 Pac. 333. It is equally well settled that, so long as the title, legal and equitable, is in the United States, it is not subject to taxation by the state. *Railway Co. v. Prescott*, 16 Wall. 603; *Railway Co. v. McShane*, 22 Wall. 444; *Northern Pac. R. Co. v. Traill County*, 115 U. S. 600; *New Orleans Pac. R. Co. v. United States*, 124 U. S. 124; *Colorado Co. v. Commissioners*, 95 U. S. 259; *Page v. Pierce County*, 25 Wash. 6, 64 Pac. 801. This question, as in all such cases, depends upon a construction of the act under which the land is granted. *Page v. Pierce County*, *supra*.

It may be laid down as a fundamental proposition that, where the settler has done all that there is to do, i. e., settlement and improvement, as under the homestead law, or settlement, improvement and payment, as under the preemption law, and has made his proof and received a final receipt and nothing remains to be done on the part of the government except the administrative act of issuing a patent, the title has so far passed as to sustain a transfer or incumbrance of the property. Being then a subject of private ownership and proprietorship, it follows as of course that it is a subject of taxation.

A final receipt is an evidence that the conditions of the grant, whatever they may be, have been complied with and vests the equitable title. *Bolton v. La Camas Water Power Co.*, 10 Wash. 246, 38 Pac. 1043. And this is so although the government may thereafter refuse to convey the land because found to be mineral, or otherwise exempt from the operation of the grant, or because of fraud in the acquisition of the asserted right, or because the title is in dispute. *Northern Pac. R. Co. v. Patterson*, 154 U. S. 130; *Northern Pac. R. Co. v. Myers*, 172 U. S. 589.

On the other hand, if the grant is made upon condition to be performed after a preliminary payment, whether it be an entry fee or the purchase price, the full legal and equitable title is reserved in the government until the performance of the condition and proof to sustain it. "Until this is done,

the equitable title of the company [the grantee] is incomplete. There remains a payment to be made [a condition to be performed] to perfect it. There is something to be done without which the company is not entitled to a patent." *Railway Co. v. McShane, supra.*

In speaking of the principal cases cited above, the supreme court of the United States said in the *Myers* case:

"It was decided that lands sold by the United States might be taxed before they had parted with the legal title by issuing a patent; but this principle, it was said, must be understood to be applicable only to cases where the right to the patent was complete, and the equitable title was fully vested in the party without anything more to be paid *or any act to be done* going to the foundation of his right." The italics are ours.

Clearly, under the act quoted, the foundation of a purchaser's rights rests upon improvement as well as payment. In the case at bar, there is neither a patent nor a right to a patent, and there may never be. The condition subsequent to the receipt may never be performed. A receipt for the purchase price is not a final receipt entitling appellant to a deed or patent in due course of administration. It must be construed and measured by the terms and conditions of the statute under which it was issued.

The principle governing this case was held to be controlling in *Railway Co. v. Prescott, supra*. In that case a parcel of land granted by the government had been sold for a tax imposed by the state. The railway company brought suit to quiet its title, resting its claim entirely upon the terms of the grant. Congress had provided:

"That before any of the lands granted by the act should be conveyed to the company, the cost of surveying, selecting, and conveying said lands should first be paid into the treasury of the United States by the company or party in interest."

It was conceded that the company had in all things complied with the terms of the grant and fulfilled all conditions,

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saving only the requirement that it pay the cost of surveying, selecting and conveying the land. The court held that the land was not taxable, saying:

"While we recognize the doctrine heretofore laid down by this court, that lands sold by the United States may be taxed before they have parted with the legal title by issuing a patent, it is to be understood as applicable to cases where the *right* to the patent is complete, and the equitable title is fully vested in the party without anything more to be paid, or any act to be done going to the foundation of his right. The present case does not fall within that principle . . .

"If the company have such an interest in these lands that they can be sold by the state under her power of taxation, then the title is divested out of the government without its consent, and the right to recover the money expended in the surveys is defeated. As the government retains the legal title until the company or some one interested in the same grant or title shall pay these expenses, the state cannot levy taxes on the land, and under such levy sell and make a title which might in any event defeat this right of the Federal government reserved in the act by which the inchoate grant was made."

This case has been repeatedly followed, but counsel submit the cases, *Central Pac. R. Co. v. Nevada*, 162 U. S. 512, and *Maish v. Arizona*, 164 U. S. 599, as holding a contrary doctrine. It is true that granted lands subject to the performance of the condition of the act, that is, the payment of cost of surveying, selecting and conveyance, were held to be taxable in the cases cited. But it will be seen that it was so held under the express provisions of an amendatory act passed July 10, 1886, 24 U. S. Stat. 143, and which by its terms is limited to lands granted to railroads. The tax imposed by the state and a title acquired thereunder are made subject to the unpaid lien of the United States.

We find nothing to take this case out of the general rule. In this case the title, legal and equitable, is in the United States and dependent upon a condition subsequent to the issuance of the preliminary receipt and precedent to the deed.

The equitable title is not in a purchaser possessing evidence of performance of a condition precedent. To paraphrase our holding in *Haumesser v. Chehalis County*: Appellant has not done everything, or performed every condition required of him to entitle him to a patent, and more is to be done by him before he can claim the issuance of a patent. The distinction between the cases relied on and the *Prescott* case is noticed and admitted in the *Haumesser* case. We said:

“Respondent relies upon *Kansas Pac. R. Co. v. Prescott*, 16 Wall. 603. But that was a case where the court held that the equitable title had not fully vested in the railway company because the railway company had not paid the cost of the survey as required by the act granting the land to it. That was an act going to the foundation of the right to the land. In this case, the final certificate was issued upon proofs, and the equitable title thereby fully vested in the settler.”

Counsel says no time is fixed in the act for the making of improvements to the value of \$300, and appellant may postpone compliance with the law indefinitely and thus defeat the rights of the state to tax property of which he is in full enjoyment.

This may be true, but it is the fault of the law. If appellant does not in good faith comply with the terms of the grant, the government has its remedy and can exercise it as it has done in other cases. Its power to grant upon any terms cannot be made the subject of either legal or equitable inquiry by the state. A state cannot, even under the broad power of taxation, revise the terms of, or interfere with, Federal grants, however unreasonable they may appear to be, nor can it embarrass the government in any way in the disposition of that which is its own.

Reversed, and remanded with directions to enter a decree in favor of appellant.

MORRIS, C. J., HOLCOMB, MOUNT, and MAIN, JJ., concur.

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Opinion Per MOUNT, J.

[No. 12418. Department Two. July 28, 1915.]

J. L. McDONNELL *et al.*, *Plaintiffs*, v. PATRICK C. SHINE,
Defendant.¹

JUDGMENT—NOTWITHSTANDING VERDICT—TIME FOR ENTRY. After the entry of judgment upon the verdict, the court is without power, upon motion for judgment notwithstanding the verdict or in the alternative for a new trial, to order the judgment reduced unconditionally, which was in effect granting the motion for judgment after entry of a final judgment in the case; its power being limited to granting the motion for a new trial, unconditionally, or upon the condition of remitting part of the verdict.

Cross-appeals from a judgment of the superior court for Spokane county, Webster, J., entered April 7, 1914, upon the verdict of a jury rendered in favor of the plaintiffs, in an action in tort. Reversed on plaintiffs' appeal.

Zent, Powell & Redfield, for plaintiffs.

P. C. Shine, for defendant.

MOUNT, J.—This action was brought to recover damages from the defendant because of alleged fraud and breach of warranty upon the sale of certain cattle and horses. Upon issues joined, the cause was tried to the court and a jury, and resulted in a verdict in favor of the plaintiffs for the sum of \$642. Upon the day the verdict was returned, a judgment was signed by the court and entered by the clerk in conformity with the general verdict. Thereafter the defendant filed a motion for judgment notwithstanding the verdict, and in the alternative, for a new trial. Upon the hearing of this motion, the court entered the following order:

"It is hereby ordered and adjudged that the judgment made and entered herein on January 12, 1914, be and the same is hereby modified by reducing the principal sum thereof by \$215 and that said judgment remain in force and effect

¹Reported in 150 Pac. 817.

as a judgment for \$427, with interest thereon at six per cent per annum from January 12, 1914, together with plaintiffs' costs and disbursements in this action. The motion for a new trial and the motion for a judgment notwithstanding the verdict are hereby denied, except in the respects hereinabove set forth."

Both parties have appealed from that judgment. The defendant's appeal was dismissed. The plaintiffs' cross-appeal remains to be considered.

The cross-appellants argue that the motion for judgment notwithstanding the verdict was filed too late, and that the court was without power to modify the judgment except by granting a new trial. This position must be sustained. In the case of *Paich v. Northern Pac. R. Co.*, ante p. 379, 150 Pac. 814, we laid down the rule definitely, that a motion for judgment notwithstanding the verdict comes too late after the entry of the judgment. It will be noticed in the statement above made that a formal judgment was signed by the court and entered by the clerk before the motion for judgment *non obstante* was made. It is plain, we think, that the order in this case was an order granting the motion for judgment *non obstante veredicto*, because an entirely new judgment was ordered to be entered after the original judgment had been entered. It was the duty of the court, upon the hearing of the motion for a new trial, either to deny or to grant the same unconditionally, or conditionally upon the remission of a certain amount of the verdict. The court did not do this, but ordered a judgment to be entered for a less sum than that returned by the verdict, without giving the plaintiffs an opportunity to accept the reduction, or to have a new trial. We think the trial court was clearly in error in the respects mentioned.

The judgment appealed from by the cross-appellants is therefore reversed, and the cause remanded with instruction to the lower court to pass upon the motion for a new trial,

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Statement of Case.

as was directed in the case of *Paich v. Northern Pac. R. Co.*, *supra*, and for the same reason there stated.

MORRIS, C. J., HOLCOMB, CHADWICK, and PARKER, JJ.,
concur.

[No. 12591. Department One. July 28, 1915.]

PUGET SOUND WAREHOUSE COMPANY, *Appellant*,
LAWRENCE L. DAVISON *et al.*, *Interveners and*
Respondents, v. E. E. LAHUE *et al.*, *De-*
fendants, JONES-SCOTT COMPANY,
Garnishee Defendant.¹

ASSIGNMENTS—PROCEEDS OF CROP SALE—AGREEMENT—TRUST—EVIDENCE—SUFFICIENCY—CONSIDERATION. Where a cropping tenant, indebted to his landlord on a promissory note, and to a warehouseman for sacks, stored the crop of wheat in the warehouse and deposited the warehouse receipts in a bank where the tenant's note was held as collateral, and these parties, together with others claiming the right to liens for harvesting the crop, got together and agreed that the wheat should be sold, which was done, and part payment made by check to the bank holding the wheat receipts, one-third of which was supposed to belong to the tenant, the fact that the memorandum of sale of the wheat was made by the tenant as his own wheat, instead of for his creditors, does not show that there was no assignment of the fund or trust for the labor claimants for harvesting, where it further appears that it was customary for the grower to make the sale of his own wheat, that the indorsed wheat receipts were delivered to the tenant for that purpose, that he was to bring the money to the bank for distribution, and in the settlement the labor claims for harvesting were spoken of as being the first to be paid; the relation of debtor and creditor being sufficient consideration for the understanding to pay such labor claims.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered February 14, 1914, upon findings in favor of the interveners, in garnishment proceedings, tried to the court. Affirmed.

J. G. Thomas and *W. A. Toner*, for appellant.

Sharpstein & Sharpstein, for interveners and respondents.

¹Reported in 150 Pac. 630.

CHADWICK, J.—Defendant E. E. LaHue was a tenant of the defendant A. B. Olson for the crop year of 1912. LaHue was indebted to Olson in a sum exceeding \$4,000. At the times hereinafter mentioned, he was also indebted to plaintiff in the sum of \$315 for sacks, and to the interveners in a large sum for harvesting his crops. After the harvest, LaHue stored the grain in the warehouse of plaintiff, taking, as we gather from the testimony, ordinary warehouse receipts with no notation of any amount due for advances. LaHue indorsed the receipts and took them to the Third National Bank, where Mr. Olson did business and where the LaHue note was held as collateral. They there remained until some time in October, when the interveners, becoming more insistent in their demands for the amount due them for harvesting, the parties LaHue, Olson, Davison and Paxton, went to the bank and the matter was taken up with Mr. Kellough, the president of the bank, who advised a sale of the wheat. Whereupon the wheat was sold to Jones-Scott Company, the garnishee defendant. A check in part payment was drawn in favor of the bank for \$1,850. The wheat was not No. 1 and was bought subject to terminal grades. The balance of the purchase price was reserved until the grain was shipped and graded at tidewater.

On December 12, the Jones-Scott Company sent the receipts over to the plaintiff and ordered the grain shipped out. It was informed that it would not do so until the sack bill was paid. The manager of plaintiff asked Mr. Kellough to accept an order for the sack bill, which request was refused. He then obtained an order on the garnishee, signed by LaHue and Olson, to pay the sack bill out of the further proceeds of the grain. This he asked the Jones-Scott Company to accept. It refused to do so unless Mr. Kellough would sign it. At this point it seems that the manager of the Jones-Scott Company advised a garnishment proceeding, it being certain there would be a balance due on the wheat over the amount paid. Plaintiff accordingly instituted this suit, Davison and

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the Paxton-Stine Company intervening and setting up ownership in the fund, which has since been paid into court.

It is the contention of the interveners that they became parties to the agreement that the wheat should be sold and that they be paid out of the proceeds in order to save filing a lien which they then threatened. Inasmuch as the case, in so far as the interveners are concerned, seems inevitably to turn on the testimony of Mr. Kellough, we shall quote from it as abstracted by appellant:

"Mr. Olson had a mortgage and witness' bank was holding the LaHue notes as collateral security against Mr. Olson. Mr. LaHue brought the receipts in as soon as he harvested. Afterwards Mr. Davison, Mr. Paxton and Mr. Brotherton came in and claimed they had not been paid for their labor and wanted the money. They were going to put a lien on the wheat unless some arrangement was made whereby they had got their money. Witness talked it over with Olson and finally they got together and decided that the wheat be sold and the money paid to Davison and Paxton as assignees. LaHue brought Davison and Olson in. Witness was holding the wheat receipts then and one-third of it was supposed to belong to Olson. The receipts were indorsed. Regarding the sale, Messrs. LaHue, Davison and Paxton came in and decided to sell the wheat and witness handed the receipts to LaHue with the understanding that LaHue should sell the wheat at a stipulated price. He was to bring the money back to the bank and witness was to pay the money *pro rata* as far as it would go to Paxton-Stine Co. and Davison. . . .

"LaHue went to sell the wheat because the wheat was in his name. It is customary for a man to sell his own wheat. Witness remembers having talked with Mr. Jones about the sack bill and believes that Mr. Jones came to the witness and said he had a sack bill against the wheat and wanted witness to sign order. Witness told him he could do nothing for him as he had no right to sign the order. Witness said that the labor had not been paid for yet and that it would come first. Witness was sure he talked about the labor claim. When asked whether witness told Mr. Jones anything about holding the wheat as trustee for anyone, witness answers: 'No, sir;

there was no mention of that. I said the labor had not been paid for, and had to be paid for first'."

LaHue also admits on cross-examination:

"When asked whether it was not the understanding that Mr. Kellough should pay the harvest expenses out of this money he said that it was implied in a way that the wheat was to go towards paying the expense proposition, and that was one reason the money was handled through the Third National Bank, but not the only reason."

Upon these facts, a judgment was entered in favor of the interveners.

It is insisted that there was no assignment of the fund in favor of the interveners and that Mr. Kellough was not a trustee holding a fund for their benefit. The first reliance is that the wheat was sold by LaHue as his own wheat, as evidenced by the memorandum of sale. Standing alone, this might have weight, but when considered in the light of Mr. Kellough's testimony that Mr. LaHue, who admittedly had no other interest in the wheat except to get the top market price, was given the receipts to deliver to the purchaser and return the proceeds, and the further fact that the check was made in favor of the bank, we think the inferences flowing from the memorandum are entirely overcome.

The question of equitable assignment is not in the case. As between the parties, LaHue and the interveners, it was clearly a lawful thing, as between themselves and as against third persons having no lien, to sell the grain upon an understanding that the money should, when collected, be paid to the interveners. The relation of debtor and creditor is sufficient to sustain the transaction, and it can make no difference to third parties whether the bank or Mr. Kellough is called a trustee, agent, or an assignee of LaHue for the benefit of respondents.

We find no error. Affirmed.

MORRIS, C. J., CROW, MOUNT, and HOLCOMB, JJ., concur.

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Opinion Per MAIN, J.

[No. 12660. Department One. July 28, 1915.]

MARY I. BRODERICK, *Appellant*, v. PUGET SOUND TRACTION,
LIGHT & POWER COMPANY, *Respondent*.¹

PARTIES—TRUSTEE OF EXPRESS TRUST—IMPLICATION OF LAW. Where repairs to plaintiff's automobile were made at the instance of a casualty company, which had insured the machine but failed to pay the repair bill, the owner, after receiving the machine fully repaired, is not entitled to maintain an action for the amount of the repairs against the party causing the damage, as trustee of an express trust under Rem. & Bal. Code, § 180, defining a trustee of an express trust as a person with whom or in whose name a contract is made for the benefit of another; since the trust, on obtaining judgment, is one arising by implication of law.

SAME—REAL PARTIES IN INTEREST. In such case, the plaintiff, being fully compensated by complete repairs of the machine and not liable for the bill, could not maintain an action in her own right as the real party in interest.

JUDGMENT—CONCLUSIVENESS—BAR — IMPLIED TRUSTEE. Judgment in favor of a trustee by implication of law is not a bar to the right of any one who had become subrogated to maintain a subsequent action, where the trustee failed to account.

Appeal from a judgment of the superior court for King county, Humphries, J., entered November 2, 1914, upon findings in favor of the defendant, dismissing an action in tort, tried to the court. Affirmed.

A. F. Williams, for appellant.

James B. Howe and *A. J. Falknor*, for respondent.

MAIN, J.—This action was brought for the purpose of recovering damages claimed to have resulted to the plaintiff's automobile by the negligence of the defendant. In due time after the issues were framed, the cause came on for trial before the court sitting without a jury, and resulted in a judgment of dismissal. From this judgment, the plaintiff appeals.

¹Reported in 150 Pac. 616.

The facts are briefly as follows: On the 5th day of February, 1918, and for some time prior thereto, the plaintiff was the owner of an automobile. This automobile, for a compensation, was taken care of by the Broadway Automobile Company. When the appellant desired to use the automobile, she would 'phone the Broadway Automobile Company and an employee of that company would deliver it at her home. When she desired it returned from her home to the garage, she would 'phone the automobile company and an employee of that company would call for the car and return it. On the evening of the date above mentioned, when an employee of the automobile company was returning the automobile from the home of the plaintiff to the garage, the automobile collided with a freight car owned by the defendant company.

The Broadway Automobile Company carried insurance covering automobiles in its charge, in the Missouri Fidelity & Casualty Company. Shortly after the accident, the officers of the Broadway Automobile Company and the representatives of the Missouri Fidelity & Casualty Company held a conference, and it was decided to call for bids for the repairs made necessary to the automobile by reason of the collision. Bids being called for, one Alexander Christie being the lowest bidder, the contract was awarded to him, and most of the repairs were made by him. A portion of the work, however, was done by the Broadway Automobile Company. Neither Alexander Christie nor the Broadway Automobile Company ever presented a statement to the appellant covering the amount of such repairs. Alexander Christie made out his account against the Broadway Automobile Company. No insurance was ever paid by the casualty company. Neither was Alexander Christie nor the Broadway Automobile Company ever paid for the repairs. The machine, after it was repaired, apparently was used by the appellant under the same arrangement with the Broadway Automobile Company which had existed prior to the accident. The appellant makes no

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claim for damages on account of any depreciation in the value of the car, due to the accident. She did claim damages in the sum of \$45, which she expended in the hire of another automobile while her own car was undergoing the repairs.

At the conclusion of the trial, the trial court was of the opinion that the appellant had no right to maintain the action for any other sum than the \$45 mentioned, and offered to enter a judgment in her favor for this sum. This judgment the attorneys who appeared for her in the action declined to accept. Thereupon a judgment was entered as above indicated, dismissing the action.

The trial court found that the appellant had no interest in the action; that she never authorized, or became liable for, the bills or expenses incurred in repairing the automobile; that the bills were authorized by the insurance company, whose attorneys appeared in the present action. Exceptions were sought to be taken to these findings. It is argued by the respondent that the exceptions are not sufficient to challenge the correctness of the findings. It will be assumed, but not decided, that the exceptions are sufficient to call in question the correctness of the findings. Without reviewing the evidence in detail, it may be said that, after giving attentive consideration to all the evidence in the record, we are of the opinion that the evidence supports the findings.

The controlling question in this case is whether the appellant, after receiving her machine fully repaired, had such an interest in the claim against the defendant company, alleged to be due to its negligence, that she could maintain the action. Rem. & Bal. Code, § 179, provides that:

“Every action shall be prosecuted in the name of the real party in interest, except as is otherwise provided by law.”

Section 180 of the code provides, among other things, that a trustee of an express trust may sue without joining the person for whose benefit the action was prosecuted. This section of the statute also defines a trustee of an express trust as, “a person with whom or in whose name a contract

is made for the benefit of another." It is obvious that the appellant was not the trustee of an express trust within the meaning of the statute. If the appellant should prosecute the action to judgment, she would hold the amount recovered in trust for some other person; but this trust would be one arising by implication of law. *Pratt v. Radford*, 52 Wis. 114, 8 N. W. 606.

The appellant claims that the respondent is not in a position to object to the action being prosecuted in the name of the appellant, because in this action the respondent could plead all of its defenses and counterclaims, and that a judgment rendered in this action would be *res judicata* as to an action prosecuted by any other person upon the same claim. For the purposes of this case, it will be admitted that the rule is that a defendant cannot object to the capacity of the plaintiff to maintain the action where the defendant has the right in the action instituted to plead all of its defenses and counterclaims, and where a judgment in that action would operate as a bar to any subsequent action by any other person who might claim any rights by subrogation. If the appellant has the right to maintain the action, it follows, as a necessary corollary, that she has the right to release and discharge the respondent from liability. The appellant, aside from the \$45 mentioned, with which we are not here concerned, has no interest in the controversy. Her automobile having been completely repaired, she is fully compensated, and would not have the right in her own behalf now to maintain an action against the respondent for damages claimed to be due to its negligence. *Connecticut Fire Ins. Co. v. Erie R. Co.*, 73 N. Y. 399, 29 Am. Rep. 171; *Nelson v. Western Steam Nav. Co.*, 52 Wash. 177, 100 Pac. 325; *Olson v. Erickson*, 53 Wash. 458, 102 Pac. 400.

The last two cases cited, which are from this court, are personal injury cases, and they support the rule that a person injured through the negligence of another cannot recover for surgical aid or hospital bills when such expenses have

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neither been paid by the person injured nor has an obligation to pay them been incurred. By analogy, the rule cannot well be different as to damages sustained by property if the property has been restored to its owner fully repaired. The owner has no right to further compensation from the person causing the injury.

The question presented is finally reduced to whether a judgment obtained by the appellant in this action would operate as a complete defense to an action prosecuted by another person. The appellant not being the trustee of an express trust, if she should recover a judgment, would hold the amount recovered under a trust arising by implication of law. In such a case, the rule supported by the authorities seems to be, that if she should recover a judgment, and fail to account therefor to the person entitled thereto, her judgment would not operate as a bar to the right of any other person who had become subrogated to maintain a subsequent action. *Hart v. Western R. R. Corporation*, 13 Met. (Mass.) 99, 46 Am. Dec. 719; *Monmouth County Mut. Fire Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107; *Swarthout v. Chicago & N. W. R. Co.*, 49 Wis. 625, 6 N. W. 314; *Pratt v. Radford*, *supra*.

The judgment will be affirmed.

MORRIS, C. J., MOUNT, HOLCOMB, and CHADWICK, JJ.,
concur.

[No. 12688. Department One. July 28, 1915.]

**M. WEKSI, *Respondent*, v. PUGET SOUND TRACTION, LIGHT
& POWER COMPANY, *Appellant*.¹**

CARRIERS—INJURIES TO PASSENGERS—SETTING DOWN PASSENGERS—
NEGLIGENCE—INSTRUCTIONS. In an action by a passenger on a street
car, injured by the sudden starting of the car while he was alight-
ing, it is error to instruct the jury that the defendant was liable
for the slightest degree of negligence and that it was the duty of
the defendant to deliver the plaintiff safely at his destination; and
the error is not cured by further correct instructions as to defend-
ant's liability in case the conductor, knowing that plaintiff was
alighting, or by the exercise of extraordinary care could have known
it, started the car while plaintiff was alighting and injured him.

Appeal from a judgment of the superior court for King
county, Dykeman, J., entered September 12, 1914, upon the
verdict of a jury rendered in favor of the plaintiff, in an ac-
tion for personal injuries sustained by a passenger in alight-
ing from a street car. Reversed.

James B. Howe and *A. J. Falknor*, for appellant.

Willett & Olson, for respondent.

MOUNT, J.—Action for personal injuries. The respond-
ent was injured while alighting from one of the appellant's
street cars. He alleges in his complaint that he was injured
by reason of the negligence of the servants of the defendant
in suddenly starting the car while the respondent was in the
act of alighting. The answer was a general denial, and al-
leged contributory negligence on the part of the respondent.
The case was tried to the court and a jury. A verdict was
returned in favor of the respondent for \$1,200. A judg-
ment was afterwards entered upon the verdict for that
amount. The defendant has appealed.

In passing upon the motion for a new trial, the trial court
stated, in substance, that he believed the respondent was in-

¹Reported in 150 Pac. 443.

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sincere in claiming that, at the time of the trial, he was still suffering from injuries which he received at the time of the accident. Upon this appeal, the appellant makes two contentions: First, that the verdict and judgment are excessive; and second, that the court erred in its instructions to the jury. While we are inclined to the opinion that the verdict is excessive, and that the trial court was justified in believing that the respondent was simulating his injuries at the time of the trial, yet, in view of the fact that an excessive verdict might or might not, at the option of the plaintiff, result in a new trial, and in view of our conclusion that the instructions are erroneous and must necessarily result in a new trial, we shall pass by the question of the excessiveness of the verdict.

Upon the trial, the court instructed the jury as follows:

"The court instructs you that when the defendant in this case received the plaintiff as a passenger on its car, and had paid his fare, the defendant was bound under the law, to exercise toward the plaintiff the strictest vigilance practicable, consistent with the operation of its road in the carrying of plaintiff and letting him on and off its car. It was bound to exercise the highest degree of care, skill and diligence, practicable under the circumstances and conditions existing at the time and place in question, consistent with the operation of said railway, in order to prevent and avoid injury to the plaintiff, and the defendant is liable for the slightest negligence in its operations.

"When the plaintiff became a passenger on the defendant's street car, it became the duty of the defendant to deliver the plaintiff safely at his destination, and that involved the duty of observing him when the car got to the place where the plaintiff desired to alight and whether he had actually alighted before the car was started again. If you believe from a fair preponderance of the evidence, as the court will hereinafter define the same, that while the car was stopped, plaintiff, in the exercise of due care and diligence on his part, was in the act of alighting from said car, and that the defendant, by its conductor, knowing the same, or by the exercise of extraordinary care and diligence on the part of

such conductor could have known it, started the car while the plaintiff was so getting off, not having had a reasonable time so to do, and thereby injured the plaintiff, then your verdict should be for the plaintiff."

It is argued by the appellant that these instructions, which state that the defendant is liable for the slightest negligence, and that it became the duty of the defendant to deliver the plaintiff safely to his destination, are erroneous instructions. We think there can be no doubt upon this question. It was not necessarily the duty of the defendant to deliver the plaintiff safely to his destination. The defendant is not an insurer of the safety of passengers. Many things might occur to injure a passenger for which the appellant would not be liable. The appellant is liable only for its own negligence. If passengers are injured by the negligence of others, and the carrier is not negligent, there is no liability. The rule is that a carrier is bound to use the highest degree of care consistent with the practical operation of its cars. But this does not mean that it is bound to carry its passengers and deliver them safely at their destinations. In the case of *Johnson v. Seattle Elec. Co.*, 35 Wash. 382, 77 Pac. 677, which was very much like this case, the negligence alleged being the same, the court instructed the jury as follows:

"Now, in arriving at a solution of the question whether the plaintiff was injured through the negligence of the defendant corporation, you must consider what was the duty of the corporation in that regard at the time, under the circumstances. A corporation engaged in the transportation of passengers is held by the law to the exercise of the highest degree of care in the equipment of its road and the manner of operation of its road. A transportation company is not an insurer of the lives or limbs of its passengers, but the law calls upon it to do whatever can be done to insure their protection while they are being transported."

This instruction was held erroneous, and the case was reversed on account of it, the court saying:

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"This instruction is complained of, we think justly. While the jury are told that a common carrier is not an insurer of the lives and limbs of its passengers, yet they are told that it is liable if it has not done everything that could have been done to insure their safety. The rule is not so onerous as this. There are many things that a carrier could do which would conduce to the safety of its passengers, but which it is not required to do, simply because the practical prosecution of the business will not permit of it."

Under this rule, the instruction complained of in the present case is clearly erroneous, in that the defendant was not liable for the slightest negligence; neither was it the duty of the defendant to deliver the plaintiff safely at his destination. These things should not have been included in the instructions.

Counsel for the respondent contend that the error was cured by reason of the fact that the court told the jury later on in the same paragraph:

"If you believe from a fair preponderance of the evidence, as the court will hereafter define the same, that while the car was stopped, plaintiff, in the exercise of due care and diligence on his part, was in the act of alighting from said car, and that the defendant, by its conductor, knowing the same, or by the exercise of extraordinary care and diligence on the part of such conductor could have known it, started the car while the plaintiff was so getting off, not having had a reasonable time so to do, and thereby injured the plaintiff, then your verdict should be for the plaintiff."

This part of the instruction is undoubtedly correct. But the jury might have believed that the conductor did not know that the plaintiff was alighting from the car, and with the highest degree of care could not have known he was in the act of alighting at the time he actually did alight, and that, by reason of the fact that it was the duty of the defendant to carry the plaintiff safely to his destination, returned a verdict in favor of the plaintiff. The evidence on the part of the plaintiff tended to show that the conductor was in the front part of the crowded car when the plaintiff attempted

to alight from the car. If the jury believed this was the fact, and that the conductor, exercising the highest degree of care, did not know the plaintiff was in the act of alighting, then the jury could have based their finding entirely upon the instruction that it was the duty of the defendant to deliver the plaintiff safely at his destination. We are satisfied that this instruction was erroneous in the particulars pointed out, and should not have been given.

The judgment, for this reason, is reversed, and the cause remanded for a new trial.

MORRIS, C. J., MAIN, HOLCOMB, and CHADWICK, JJ., concur.

[No. 12715. Department One. July 28, 1915.]

HJALMER LINDQUIST *et al.*, *Appellants*, v. PACIFIC COAST COAL COMPANY, *Respondent*.¹

NEW TRIAL—MISCONDUCT OF JURY—IMPEACHMENT OF VERDICT. It is proper to deny a new trial for misconduct of the jury in the jury room, shown by affidavits of two of the jurors who did not agree to the verdict, in that certain jurors gave improper reasons for their verdict, and that one of them was sick and agreed to the verdict for that reason, and that one had signaled to a woman in another office, where, so far as not contradicted, they were statements of facts which inhere in the verdict and could not be considered.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered February 15, 1915, upon the verdict of a jury rendered in favor of the defendant, in an action in tort. Affirmed.

S. A. Keenan, for appellants.

Farrell, Kane & Stratton and Stanley J. Padden, for respondent.

¹Reported in 150 Pac. 619.

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MOUNT, J.—This action was brought by the appellants to recover damages against the defendant. The case was tried to the court and a jury. The jury returned a verdict in favor of the defendant. Ten of the jurors agreed to the verdict and two did not agree thereto. Thereafter the two jurors who did not agree to the verdict filed affidavits stating in substance that, during the consideration of the case in the jury room, one of the jurors stated that the plaintiffs were not entitled to recover because they received no assistance from their father, because neither of them were present in court, and that the boys would not be paid any money. Further, the affidavits state that one of the jurors was an elderly lady who was sick, and by reason of her sickness, agreed to the verdict; that another juror stated that, when the case was tried upon a former occasion, the trial judge granted a nonsuit; and that one of the jurors signaled from the window of the jury room to a woman in another office.

Counter affidavits were filed, in substance denying the principal statements made in the plaintiffs' affidavits. The trial court denied the motion for a new trial, and entered a judgment in favor of the defendant for costs. This appeal is prosecuted from the judgment.

The only question raised is, that the trial court erred in not granting the motion for a new trial. The appellants argue that the affidavits of the jurors who did not agree to the verdict, reciting what occurred in the jury room, must be held to be misconduct of the jury. The trial court was either of the opinion that these affidavits had been successfully contradicted, or that they were not sufficient in law to authorize the granting of a new trial. The trial court might have taken either position. If new trials must be granted upon statements such as these, made in the manner these are made, few verdicts of juries could be sustained. We are satisfied that the statements which were not disputed by the affidavits of the other jurors

were statements of facts which inhered in the verdict, and could not be considered by the court. The statements not denied are of no force. There is no merit in the appeal.

The judgment is therefore affirmed.

MORRIS, C. J., PARKER, CHADWICK, and HOLCOMB, JJ.,
concur.

[No. 12902. Department One. July 28, 1915.]

THE STATE OF WASHINGTON, *on the Relation of*
Barbara M. Floyd et al., Plaintiff, v. THE
SUPERIOR COURT FOR KING COUNTY *et al.,*
*Respondents.*¹

EMINENT DOMAIN—RIGHT TO CONDEMN—COUNTIES—STATUTES. A county may construct permanent highways through the corporate limits of cities of the third and fourth class and for that purpose condemn the necessary right of way, where the city by ordinance has authorized it, under 3 Rem. & Bal. Code, §§ 5879-18 and 5879-19, providing that the county may construct such roads, and pay or aid the city to pay for the condemnation of rights of way, if the city is unable to pay for the same, and Id., § 5879-8, providing that the county commissioners, when necessary for straightening . . . or improving any permanent highway, may take the necessary right of way by condemnation proceedings.

Application filed in the supreme court July 1, 1915, for a writ of certiorari to review an order of the superior court for King county, Jurey, J., adjudging a public use in condemnation proceedings. Denied.

J. M. Gephart and C. E. Patterson, for relators.

Alfred H. Lundin, W. F. Meier, and Edwin C. Ewing, for respondents.

MOUNT, J.—This is an application for a writ to review an order of the superior court for King county, adjudging a public use in an action by King county to condemn certain

¹Reported in 150 Pac. 618.

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lands belonging to the relators, for a permanent highway through the town of Tukwila, in King county.

It appears that, on the 11th day of May, 1915, the town of Tukwila, which is an incorporated town, passed an ordinance granting to King county a right of way through the town for a permanent highway. The ordinance authorized King county to appropriate lands within the corporate limits for the purposes of the highway. The ordinance also recited that, the town being unable to pay for the acquisition by purchase or otherwise of the right of way granted, King county shall pay the entire expense of such acquisition. The ordinance also granted to King county full power and authority to construct and maintain at its own expense the permanent highway provided for. Thereafter King county sought to condemn the lands in question. After an adjudication of public use, the relators applied here for the writ.

The sole contention of the relators is that King county is not authorized under the statute to maintain the action. The statute provides (Laws of 1913, ch. 124, p. 384), as follows:

"Sec. 1. Each and every county of this state is hereby authorized to build, construct and improve any permanent highway as same is defined by chapter 35 of the Session Laws of 1911 through the corporate limits of any city of the third or fourth class, upon such streets or other rights of way connecting with such permanent highway in the corporate limits of such municipality as may be provided for such purpose by the municipal authorities, of sufficient width and appropriate for said purpose." 3 Rem. & Bal. Code, § 5879-18.

"Sec. 2. Where such city or town is unable to pay for the condemnation of such rights of way, the county may pay or aid such municipality to pay for the same. . . ." 3 Rem. & Bal. Code, § 5879-19.

It is argued by the relators that, under this statute, the town must provide the right of way for the permanent highway, and that the county is not authorized to maintain the proceedings for appropriation by condemnation. Laws of 1911, ch. 35, p. 120, § 8, provides:

"Whenever the board of county commissioners shall find it necessary for the purpose of straightening any permanent highway, lessening the gradients thereof, or otherwise *improving* the same to acquire or appropriate lands, real estate, or other property, and are unable to agree with the owners thereof, upon the reasonable and fair value of such lands, real estate, or other property, such board is hereby authorized to acquire the same by condemnation proceedings in the manner provided by law for the appropriation of lands" 3 Rem. & Bal. Code, § 5879-8.

Chapter 124 (Laws of 1913), the substance of which is above quoted, was clearly intended to be an addition to the act of 1911, ch. 35, in which § 8, above quoted, is found. We think it is clear from these provisions that a county may construct permanent highways through the corporate limits of cities of the third and the fourth class, and for that purpose may take by condemnation the necessary right of way. This is especially true when the city itself, by ordinance, as was done in this case, granted the right of way and authorized the county to acquire the land. We think no other construction can reasonably be placed upon these provisions of the statute, and that the county has full authority to maintain the condemnation proceedings.

The application is therefore denied.

MORRIS, C. J., PARKER, CHADWICK, and HOLCOMB, JJ.,
concur.

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Opinion Per Crow, J.

[No. 12250. Department Two. July 29, 1915.]

W. H. PETER *et al.*, *Appellants*, v. LOUIS H. HENSEN *et al.*,
Respondents.¹

HUSBAND AND WIFE—COMMUNITY PROPERTY—LIABILITY FOR DEBTS—NOTE OF HUSBAND. Where a note signed by one of the trustees of a corporation was given to defray expenses in securing a contract for the corporation, which, if secured, would promote a sale of the community property of the trustee, the note was the community debt of the trustee and his wife.

SAME—COMMUNITY DEBTS—INTEREST OF COMMUNITY—EVIDENCE—ADMISSIBILITY. Upon an issue as to whether a note, made by a trustee of a corporation to defray expenses in its behalf and to promote a sale of his community property, was a community debt, the articles of incorporation, executed by him as a trustee, are admissible in evidence to show his relation to the corporation.

Appeal from a judgment of the superior court for Clallam county, Ralston, J., entered February 3, 1914, dismissing an action to enjoin an execution sale, after a hearing before the court. Affirmed.

J. W. Lindsay and James W. Redden, for appellants.

McBurney & O'Connor, for respondents.

Crow, J.—This action was commenced by W. H. Peter and Amy V. Peter, his wife, against Louis H. Hensen, a judgment creditor, and James R. Gallagher, sheriff of Clallam county, to enjoin the levy of an execution on community real estate belonging to plaintiffs. On July 30, 1908, Louis H. Hensen obtained a judgment in the superior court of King county upon a promissory note, against W. H. Peter. The note was also signed by one St. John Dix. Thereafter execution was issued upon the judgment, and delivered to James R. Gallagher as sheriff, who was about to levy the same on community real estate of W. H. Peter and wife in Clallam county. Thereupon plaintiffs commenced this action

¹Reported in 150 Pac. 611.

to enjoin Hensen and the sheriff from making the levy, upon the theory that the judgment was against W. H. Peter alone, as surety for St. John Dix; that it was his separate debt, and that the community property was not liable for its payment. From a judgment denying the injunction and dismissing the action, the plaintiffs have appealed.

The record shows that the note was signed by St. John Dix and W. H. Peter as makers; that appellant W. H. Peter and others executed articles for the organization of a corporation known as The Pacific Coast Development Company; that W. H. Peter was one of the trustees named in the articles; that a copy of the executed articles was filed in the office of the auditor; that the organization of the corporation was not entirely completed; that it proceeded, however, to do business; that St. John Dix had charge of and managed an office in Seattle in the name of the corporation, where W. H. Peter frequently visited; that at the time the note in question was signed, St. John Dix was attempting to procure for the corporation a contract to furnish ties for a proposed railroad; that appellant W. H. Peter on various occasions had business transactions with Dix; that he had signed previous notes with him which had been paid; that, by an arrangement between Dix and W. H. Peter, it was contemplated, in the event the tie contract was secured, timber for the same was to be purchased from community real estate belonging to W. H. Peter and his wife; that, to secure the contract, it became necessary for Dix to make a trip to San Francisco; that he was without funds; that he and W. H. Peter signed the note in question and borrowed money thereon from the respondent Hensen, who gave his check for the same to the Pacific Coast Development Company, and that most of the money thus borrowed was used to defray the expenses of Dix upon the trip.

Appellants contend that the evidence does not support the judgment, in that it fails to show the same to have been a community debt. If the community composed of W. H. Peter

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Opinion Per CROW, J.

and wife was to be benefited by the acts of the husband in executing this note and in endeavoring thereby to promote a sale of the timber, the community is liable for the payment of the judgment entered upon the note, as it became a community debt. *McElroy v. Hooper*, 70 Wash. 347, 126 Pac. 925; *Bird v. Steele*, 74 Wash. 68, 132 Pac. 724; *Way v. Lyric Theater Co.*, 79 Wash. 275, 140 Pac. 320. There can be no question, from the facts above stated, which are shown by the evidence, but that the community would have benefited to the extent of disposing of the timber holding had St. John Dix been successful in securing the contract. The fact that he failed in securing the same does not relieve the community of the obligation which it had incurred. In *McElroy v. Hooper*, *supra*, this court said:

"The husband has the management of the community property. As the community profits by his good judgment, so it must bear the loss of his mistakes. It cannot accept the one and repudiate the other."

Appellants further contend that the trial judge erred in admitting the articles of incorporation in evidence. The articles thus admitted had been filed with the county auditor, were executed by W. H. Peter and others, and named Peter as a trustee. This being true, they were clearly admissible for the purpose of showing Peter's relation to the corporation, which was being managed by Dix and which maintained an office and prosecuted business.

The judgment is affirmed.

MORRIS, C. J., FULLERTON, MAIN, and ELLIS, JJ., concur.

[No. 12254. Department Two. July 29, 1915.]

F. E. DANIELS, *Appellant*, v. PACIFIC BREWING & MALTING
COMPANY, *Respondent*.¹

FRAUDULENT CONVEYANCES — PREFERENCES — RIGHT TO MAKE—TO MORTGAGEES — VALIDITY OF MORTGAGE — APPEALS — MOOT QUESTION. Where falling debtors in good faith gave a preference to mortgagees under a chattel mortgage, which covered future additions to the stock and allowed possession by the mortgagors and sales in the course of trade, the validity of the mortgage, through the failure to apply all the proceeds of sales in extinguishment of the debt, is a moot question; since preferences by falling debtors are valid.

SAME—PREFERENCES—SALES IN BULK—STATUTES. A preference by a falling debtor by the transfer of a stock of goods, does not fall within the sales-in-bulk act, Rem. & Bal. Code, § 5296, requiring an affidavit and list of creditors upon sales of stocks of merchandise in bulk; since there is no sale, within the meaning of the act, where no purchase money passed.

Appeal from a judgment of the superior court for Whatcom county, Pemberton, J., entered June 2, 1914, upon agreed facts in favor of the garnishee defendant, dismissing garnishment proceedings. Affirmed.

Craven & Greene, for appellant.

S. M. Bruce, for respondent.

Crow, J.—An action was commenced by plaintiff, F. E. Daniels, as assignee of Ferdinand Westheimer & Sons, a Missouri corporation, against Pat Milan and H. Dillon, to recover the purchase price of liquors sold between January 1, and October 2, 1908. In November, 1908, judgment was entered in plaintiff's favor, upon which garnishment proceedings were instituted forthwith against the Pacific Brewing & Malting Company, a corporation, as garnishee defendant. From a judgment in the garnishee's favor, the plaintiff has appealed.

¹Reported in 150 Pac. 609.

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The facts, which are stipulated, in substance show, that, on or about November 19, 1907, Pat Milan and H. Dillon engaged in the saloon business at Lynden, Washington; that, for use in such business, they borrowed \$2,250 from the respondent, Pacific Brewing & Malting Company; that, as evidence of such loan, they executed and delivered to respondent notes maturing monthly, ten for \$200 each, and one for \$250; that, to secure the same, they also executed and delivered to respondent a chattel mortgage upon their stock and fixtures in the saloon; that the mortgage by its terms secured all subsequent indebtedness and covered all additional stock and property which they might bring into the saloon business; that the mortgage was recorded in the manner provided by law; that Milan and Dillon continued in business until October 2, 1908, prior to which time they had become indebted to respondent in the further sum of \$456.15 for beer purchased; that only \$600 had been paid on the original indebtedness; that, on October 2, 1908, Milan and Dillon, in settlement of their indebtedness to respondent corporation, executed and delivered to it a bill of sale for all property covered by the mortgage, and used in connection with their saloon business, the consideration being "the release of any personal obligation and the discharge of any claim for indebtedness held by the buyer against the sellers;" that, from the date of the mortgage to the date of the bill of sale, Milan and Dillon had made sales in their saloon business exceeding \$7,500; that, shortly after the respondent corporation received the bill of sale, it disposed of the property to a third party, and that the indebtedness which respondent released, together with expenses which it incurred, exceeded the value of the property covered by the mortgage and bill of sale.

Appellant earnestly insists that a mortgage upon a stock of goods which permits the mortgagor to remain in possession and dispose of the stock at retail is sustained in this state only upon the theory that there is an express or implied

agreement to the effect that such sales are to be made for the benefit of the mortgagee and are to be applied in reduction of the mortgage debt; and that, inasmuch as the entire proceeds of sales made by Milan and Dillon were not so applied, the mortgage has been discharged and has become invalid as against their creditors.

It is manifest that this contention can be of no avail to appellant, as the record shows nothing further than Milan and Dillon's preference of respondent as a creditor. It is the settled law of this state that a debtor in failing circumstances may prefer one or more of his creditors, if such preference be made in good faith. *Turner v. Iowa Nat. Bank*, 2 Wash. 192, 26 Pac. 256; *Vietor v. Glover*, 17 Wash. 37, 48 Pac. 788, 40 L. R. A. 297; *McAvoy v. Jennings*, 44 Wash. 79, 87 Pac. 53; *Zent v. Gilson*, 52 Wash. 319, 100 Pac. 739; *Secor v. Close*, 83 Wash. 77, 145 Pac. 56. The amount of indebtedness due from Milan and Dillon to respondent being admitted, and it being conceded that the transactions between them were *bona fide*, the existence, nonexistence or validity of the mortgage becomes a moot question.

Appellant further contends that the transfer to respondent made by the bill of sale was in violation of Rem. & Bal. Code, § 5296 (P. C. 203 § 9), commonly known as the sales-in-bulk act, in that no affidavit or list of creditors was demanded or given. This contention cannot be sustained. In *Peterson v. Doak*, 43 Wash. 251, 86 Pac. 663, we held that a debtor may transfer a stock of goods in bulk to his creditor without complying with the sales-in-bulk act, when no purchase money passes, as there is in fact no sale within the meaning of the act. The *Peterson* case was subsequently followed in *Globe Elec. Co. v. Montgomery*, 85 Wash. 452, 148 Pac. 596.

The judgment is affirmed.

MORRIS, C. J., FULLERTON, MAIN, and ELLIS, JJ., concur.

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Opinion Per HOLCOMB, J.

[No. 12507. Department One. July 29, 1915.]

FRANK B. CARD, *an Insane Person, by his Guardian, Ivan L. Hyland, Appellant*, v. PETER V. CERINI *et al.*,
Respondents.¹

HUSBAND AND WIFE—COMMUNITY PROPERTY—PUBLIC LANDS—HOMESTEAD ENTRY. Lands patented to a married man who made homestead entry while single, are his separate property.

Appeal from a judgment of the superior court for King county, Albertson, J., entered September 10, 1914, upon sustaining demurrers to the complaint, dismissing an action to recover real property. Affirmed.

Saunders & Nelson, for appellant.

James B. Howe, Peters & Powell, and *C. H. Winders*, for respondents.

HOLCOMB, J.—Appellant's father, John C. Card, on February 1, 1861, being then unmarried, made actual settlement on the land described in appellant's complaint. On February 28, 1863, while still single, John C. Card filed his application in the United States land office to enter the land as a homestead. On November 15, 1866, the entryman married appellant's mother. On May 14, 1869, the entryman filed his final proofs in the land office and, on May 20, 1872, homestead patent was issued and delivered to the entryman, which was duly recorded in King county, where the land is situate, on January 22, 1875. In 1880, the mother of appellant and wife of entryman died intestate, leaving surviving her husband and three sons. Her estate was never probated. On August 3, 1905, the father and two of his sons joined in a conveyance of the land, with certain exceptions which had been previously either conveyed or condemned, to respondent Cerini. On September 21, 1905, John C. Card died. Appellant sought by this action to recover an undivided one-

¹Reported in 150 Pac. 610.

sixth interest in the lands as heir of the one-third of an alleged community interest therein of his mother. The lower court sustained demurrers to the complaint.

The sole contention of appellant is that, when community is claimed in land patented to either of the spouses under the homestead entry laws of the United States, the date of the patent is the only point in time which can be justly considered by the state courts as controlling the status of the title, for the reason that that is the point in time when the Federal laws finally and fully release the control of the Federal government over the matter of the grant of the lands patented. We are asked to overrule or modify the effect of the decision in the case of *Teynor v. Heible*, 74 Wash. 222, 133 Pac. 1, 46 L. R. A. (N. S.) 1033. The cases of *Wadkins v. Producers Oil Co.*, 227 U. S. 368, and *Buchser v. Buchser*, 231 U. S. 157, are cited and relied on by appellant, to the effect that the supreme court of the United States binds itself by the rule of property decided by the state courts. But this statement is too broad. The supreme court of the United States did, indeed, in the *Buchser* case, announce that:

“By the laws of the state of Washington, in which the property is situated, it became community property unless the statutes of the United States forbid. *Teynor v. Heible*, 74 Wash. 222, 133 Pac. Rep. 1. On that point we follow the Washington decisions.”

But this statement is based upon the further premise that there is no conflict of law between the state and the Federal government. If “the statutes of the United States forbid,” the state rule of property as construed by the state courts would not control. In the *Buchser* case, the court further say:

“There is no doubt, of course, that until the title is completed, the laws of the United States control. *Wadkins v. Producers Oil Co.*, 227 U. S. 368; *Bernier v. Bernier*, 147 U. S. 242; *Hall v. Russell*, 101 U. S. 503; *Gibson v. Chouteau*, 13 Wall. 92. But when the title has passed then the

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land 'like all other property in the state is subject to state legislation.' *Wilcox v. Jackson*, 13 Pet. 498, 517; *Irvine v. Marshall*, 20 How. 558, 664; *McCune v. Essig*, 199 U. S. 382, 390."

In the *Wadkins* case, the Federal supreme court held:

"Under §§ 2291, 2292, Rev. Stat., no rights accrue to the wife of an entryman who dies before the entry is perfected, and nothing passes under the inheritance laws of the state in which the land is situated."

It may be considered that the latter portion, "and nothing passes under the inheritance laws of the state in which the land is situated," is an adoption of the state rule of decision (Louisiana); but the decision of the United States supreme court looked to the provisions of §§ 2291 and 2292, U. S. Rev. Stat., granting rights by the United States to the widow, or the children in the event the wife died, to complete residence and make final proof and receive patent; and it is stated that, prior to the time when the entryman "had fully complied with the provisions of the homestead law, and *submitted proof thereof* to the local land office [*italics ours*], his right was essentially inchoate and exclusively within the operation of the laws of the United States, and those laws, as we have seen, fully dealt with the subject of who should be the beneficiary of a compliance with them, thereby excluding state laws from that field." We are satisfied with the rule announced in the *Teynor* case, that "in all cases where the marital relation does not exist at the time of the original settlement and entry, and continue until final proof is made, the property should be held to be the separate property of the spouse who finally acquires the patent to the land."

We are further fortified in our position by a consideration of the fact that, to change the rule announced in the *Teynor* case, would be to again vacillate from an established rule, a rule affecting perhaps thousands of titles, and the law should sometime be at rest. If an instant of time must be selected and established to operate upon the title, we can

think of none which will avoid confusion so completely as the one selected. If the instant of delivery of patent should be chosen, as contended for by appellant, there might be cases where an entryman's wife, who bore that relation from entry to final proof, died before the issuance of patent and the entryman married another wife before patent issued. Then the children and heirs of the wife who had assisted the entryman would be deprived of their property most inequitably. The rule we have adopted is the most just and certain of any we can establish under a community system. It is in consonance with the Federal laws and decisions, and should remain fixed.

Judgment affirmed.

MORRIS, C. J., MAIN, MOUNT, and CHADWICK, JJ., concur.

[No. 12530. Department One. July 29, 1915.]

FRED ROSE, *Appellant*, v. ADOLPH RUNDALL, *Respondent*.¹

ELECTION OF REMEDIES — VENDOR AND PURCHASER — CONTRACT — BREACH — INCONSISTENT CONCURRENT ACTIONS. Where a vendor brought suit for the first installment due upon a contract for the sale of land, and prior to trial, prosecuted to judgment a second suit to forfeit the contract and quiet title for nonpayment of the second installment, the second action was an election of remedies and an abandonment of the previous pending action for the securing of unpaid purchase money; since the remedies were inconsistent and cannot be presented concurrently as accumulative remedies.

Appeal from a judgment of the superior court for King county, Frater, J., entered October 26, 1914, upon findings in favor of the defendant, in an action on contract, tried to the court. Affirmed.

Myers & Johnstone, for appellant.

HOLCOMB, J.—There was a contract in writing made by the parties on December 1, 1911, wherein appellant agreed

¹Reported in 150 Pac. 614.

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to sell, and respondent agreed to purchase, a tract of real estate in King county for \$3,000. The sum of ten dollars was paid by the vendee in cash, and it was agreed that the balance should be paid in three equal annual installments of \$997 each, on December 1, 1912, 1913, and 1914, with annual interest at seven per cent on the deferred amounts. Respondent defaulted on the installment due December 1, 1912, and this action was brought on November 8, 1913, to recover that installment and interest on the whole contract, aggregating \$1,310.95. Subsequent to the institution of this action and on December 18, 1913, appellant served on respondent a written notice of forfeiture of the contract of purchase, and on January 13, 1914, appellant and his wife commenced an action in the superior court of King county against the respondent and his wife, to quiet the title to the premises described in the contract.

On May 1, 1914, respondent, through his attorneys, the Messrs. Revelle, answered the complaint in the case in hand by way of denial that there was anything due appellant as alleged in his complaint, and a further affirmative plea in abatement that "plaintiff has elected to bring another action involving the contract alleged in plaintiff's complaint, known as cause No. 98871, which action is still pending in this court." Appellant replied, denying the affirmative answer of respondent. On these issues, the cause proceeded to trial on September 28, 1914, in the superior court, and the pleadings and files, including a judgment entered on May 18, 1914, in cause No. 98871, of King county, quieting the title of the plaintiff therein as against all right, claim and interest of the defendants therein under and by virtue of the real estate contract, for the default in payment of the installment of purchase price maturing December 1, 1913. The trial court thereupon made findings showing the proceedings in cause No. 98871, and concluded that defendant is entitled to judgment in this cause, and entered judgment for the defendant, from which this appeal is prosecuted.

There is no appearance here and no brief on behalf of respondent. The only question, as stated by appellant, is: Did the decree in case No. 98871, set out in the findings of fact, bar appellant of his right to judgment in this cause? The position of appellant seems to be, although not so stated, that the bringing of this action for previous installments due under the contract, being an action in affirmance of the contract, was unaffected by the later action, No. 98871, to forfeit or end the contract for later defaults on the part of the vendee, the forfeiture in no wise concerning the prior defaults on the contract. It is argued:

"Appellant by bringing this action suffered the disadvantage and deprived himself of all defaults of the respondent occurring prior to December 1, 1913. In other words, respondent had the advantage, after the beginning of this action, of a new contract, which had been in a sense deadened by respondent's defaults, or at least was subject to forfeiture, but was brought to life and put in full force by the beginning and prosecution of this action."

It is insisted that the commencement of this present cause and its prosecution for a prior default, is separate and distinct from the default and nonpayment of December 1, 1913, and has nothing to do therewith. We assume that appellant means that for each default he could elect his remedy, and pursue such remedy to determination without in any wise affecting any election of remedy for any other default. This position loses sight of the principle that some remedies lie upon an affirmance of a contract which constitutes the basis of the remedy, and others depend upon its disaffirmance. A party may frequently have co-existing, concurrent, and not inconsistent remedies upon the same foundation; as, for example, in many jurisdictions a cause of action upon a wrongful and unfounded attachment for damages and a cause of action upon the attachment bond in the same matter; and also one may have separate and independent actions for nonpayment of successive installments of the debt, so long as

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there is no "splitting" of an entire and indivisible demand. *Jacobs v. Lewis*, 47 Mo. 344; *Blauvelt v. Powell*, 59 Hun (N. Y.) 179, 13 N. Y. Supp. 439; *Bendernagle v. Cocks*, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448. But as a general rule, where a purchaser has made a default in payment of the purchase money, the vendor may either sue to rescind or forfeit the contract and recover possession, if out of possession, or sue for the purchase money due, although the contract provides for a forfeiture. 29 Cyc. 1094 (e).

An action may constitute a conclusive election of remedies, in which case its pendency seems to be pleadable as a defense in bar of a subsequent suit. *Morris v. Rexford*, 18 N. Y. 552; *Bach v. Tuch*, 126 N. Y. 53, 26 N. E. 1019; *Dickinson v. Van Horn*, 9 Cal. 207. A real estate contract, such as the one in action, is a conditional sale contract with the absolute title reserved in the vendor. It is one entire contract of sale, though the purchase money is divided into installments for the benefit of the vendee. As to sales of personal property conditionally, it has been uniformly held in this state that in such matters the seller has a choice of remedies. He may either disaffirm the contract and retake the chattel, or he may treat the transaction as an absolute sale and sue on the contract for the purchase price. But since these remedies are inconsistent, he cannot do both. The assertion of one is an abandonment of the other. *Winton Motor Carriage Co. v. Broadway Automobile Co.*, 65 Wash. 650, 118 Pac. 817, 37 L. R. A. (N. S.) 71; *Ramey v. Smith*, 56 Wash. 604, 106 Pac. 160; *Stewart & Holmes Drug Co. v. Reed*, 74 Wash. 401, 133 Pac. 577; *Thompson Co. v. Murphine*, 79 Wash. 672, 140 Pac. 1073.

It is a correct proposition that payments of installments of the purchase money, made by the vendee under such conditional contract of sale, either voluntarily or involuntarily, so long as the contract remains in force, would not relieve from a forfeiture for nonpayment of installments subsequently maturing. Nor would the procuring of a previous

judgment for previous installments, which remains unsatisfied, bar the vendor from declaring a forfeiture for default in payment of subsequent installments, for the remedies were not then used concurrently and accumulatively. But clearly, whenever the vendor elects to declare the contract forfeited by the vendee, and does so, and procures a final judicial decree fully and finally abrogating the contract, all other undetermined and coexisting rights cease and are determined. If the contract is abrogated, it is not "in a sense deadened," to use appellant's words, but it is absolutely dead. It is *functus officio*. If it is so as to one party, it is so as to the other. It cannot thereafter be revived and made a live contract by one party alone. The vendor alone cannot breathe the breath of life into it. All unpaid balances, not liquidated in judgment, are waived from the instant that the contract is declared extinct. The appellant elected and chose to formally and solemnly disaffirm and declare forfeit the unexecuted provisions for the benefit of the respondent, by bringing, prosecuting, and pursuing to judgment his cause No. 98871, for the judicial termination thereof. That constituted an abandonment of the action then pending for the recovery of any unpaid purchase money under the contract. By that election he must abide.

The case cited by appellant, *Lord v. Wapato Irrigation Co.*, 81 Wash. 561, 142 Pac. 1172, does not sustain his contention. There is no inconsistency in the plea of abrogation of a contract and demand of damages for a breach of its conditions, as pointed out in the cited case. Both disaffirm the contract. In appellant's cases, in the one he stands upon the contract in all its terms, and in the other he abrogates it. He cannot do both concurrently.

Judgment affirmed.

MORRIS, C. J., MOUNT, MAIN, and CROW, JJ., concur.

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[No. 12538. *En Banc*. July 29, 1915.]

J. M. MAGGS *et al.*, *Appellants*, v. THE CITY OF SEATTLE,
Respondent.¹

MUNICIPAL CORPORATIONS — CLAIMS — REQUISITES — RESIDENCE OF CLAIMANT—STATUTES. Rem. & Bal. Code, § 7995, providing that every claim for damages sounding in tort against a city of the first class, filed in compliance with valid charter provisions of the city, shall contain a statement of the actual residence of the claimants at the date of presenting and filing such claim and for six months immediately prior to the time the claim accrued, is substantially complied with—and that is all that is required—by a notice stating the claimant's residence at the date of the verification and for at least six months prior thereto, when both verified and filed within thirty days after the claim accrued; the presumption being that the residence remained the same until the day of filing, and all the purposes of the statute being thereby fulfilled.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 29, 1914, upon sustaining a demurrer to the complaint, dismissing an action for damages to property. Reversed.

E. H. Guie, *W. A. Keene*, and *E. F. Chabot*, for appellants.

James E. Bradford and *Howard M. Findley*, for respondent.

ELLIS, J.—This is an action for damages which it is alleged were caused to the plaintiffs' property by the careless and negligent filling of a contiguous street by the city of Seattle. The complaint and an alleged copy of the plaintiffs' claim for damages thereto attached show that the claim was verified on December 31, 1912, and was presented to the city council and filed with the city clerk on January 13, 1913.

The defendant demurred to the complaint upon the grounds that it does not state sufficient facts, and that the action was not commenced within the time allowed by law. The demurrer was sustained. The plaintiffs electing to abide by

¹Reported in 150 Pac. 612.

their pleading, judgment was entered dismissing the action with costs. Plaintiffs appeal.

The sole question presented on the briefs and in argument relates to the time of verification of the claim. The sufficiency, neither of the complaint nor of the claim, is questioned in other particulars. The applicable provision of the city charter, sec. 29 of art. 4, among other things, provides that all claims for damages against the city must be sworn to by the claimant and presented to the city council and filed with the city clerk within thirty days after the time when such claim for damages accrued. The act of 1909, relating to claims against cities of the first class, Rem. & Bal. Code, § 7995 (P. C. 77 § 133), provides that every claim for damages sounding in tort, against any city of the first class, filed in compliance with valid charter provisions of such city, shall contain, in addition to the valid requirements of the charter, "a statement of the actual residence of such claimant, by street and number, at the date of presenting and filing such claim; and also a statement of the actual residence of such claimant for six months immediately prior to the time such claim for damages accrued." Section 7997 declares compliance with the "provisions of this act" to be mandatory.

Independent of some valid charter provision requiring the presentation and filing of a claim, this act of 1909 has no force. It merely adds a new requirement to those made by the charter. It merely declares that requirement mandatory, but not the requirements contained in the charter itself.

"The first section of the act of 1909 makes it manifest that the provisions of that law, as relating to cities of the first class, have no independent force. They can only be invoked by reference to the city charter, and as applying to claims prescribed and filed 'in compliance with valid charter provisions of such city.' That law does not extend the requirement of notice, either as contained in any city charter or as contained in the law itself, to other persons or other torts than those contemplated by such city charter. If the

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charter does not require the presentation or filing of any notice of claim in a case such as here under consideration, then the law of 1909 requires none." *Wolpers v. Spokane*, 66 Wash. 638, 120 Pac. 118.

The notice of claim here in question gives the residence of all of the claimants at the date of the verification of the claim and for one year prior thereto as No. 1611, Eighth avenue north, in Seattle, Washington. The respondent contends that this notice speaks as of the date of the verification and not as of the date of the filing, hence does not meet the requirements of the above cited statute. In support of this contention, our decisions in the cases of *Ransom v. South Bend*, 76 Wash. 396, 136 Pac. 365; *Collins v. Spokane*, 64 Wash. 158, 116 Pac. 663, 35 L. R. A. (N. S.) 840; *Connor v. Seattle*, 76 Wash. 37, 135 Pac. 617; *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820, and *Benson v. Hoquiam*, 67 Wash. 90, 121 Pac. 58, are cited. In these decisions we held that the provisions of this statute, and of the cognate statute touching cities of the third and fourth classes, are mandatory; that compliance therewith is a condition precedent to the bringing of the action, and that the giving of notice in substantial compliance with the statute must be alleged and proved. Neither of these cases, however, touches the point here involved. In the *Ransom* case, the claim was not filed until seventy-three days after the accident. In the *Collins* case, the claim contained none of the statutory requirements. In the *Kincaid* case, the claim was not verified at all and did not state the place of the claimant's residence, but we held that, in that case, no notice was required. In the *Connor* case, and also in the *Benson* case, the claim contained no reference whatever to the claimant's place of residence. Moreover, both the *Ransom* case and the *Benson* case arose under the statute relating to cities of the third and fourth classes, a statute complete in itself without reference to any charter provision. Rem. & Bal. Code,

§ 7998 (P. C. 77 § 57). In none of these cases was there any compliance with the statute, substantial or otherwise.

In the case of *Decker v. Seattle*, 80 Wash. 187, 141 Pac. 888, in which the same question was presented as found here, we call attention to the fact that we have never held that even the mandatory requirement of a statute may not be met by a substantial, though not an exact, nice and literal compliance with its terms. The only difference between the notice in the case here and that in the case last cited is found in the fact that in the *Decker* case the notice was verified three days before it was filed, and in this case the notice was verified thirteen days before it was filed. In both cases the notice was verified, presented and filed within the thirty days required by the charter provision. In the *Decker* case, we held that the interval between the verification and the filing of the claim was so short as to constitute a substantial compliance with the statute, and that it was only reasonable to permit the claim to be supplemented by proof that the place of residence was not changed in the interval.

This case was originally submitted to Department No. Two of this court, but, owing to the continual recurrence of the question involved, we have secured the consent of both parties to its submission on the briefs to the court *En Banc*. After mature consideration, we are firmly convinced that a claim which states the claimant's place of residence at the date of verification and for at least six months prior thereto, when both verified and filed within thirty days after the claim accrued, as provided by the charter, must be construed as reading as of the date of filing, and as making a *prima facie* showing of the residence as of that date, the presumption being that the place of residence remains unchanged until the contrary is made to appear. This is the general rule in all cases where a status is once established. Such a construction meets every possible useful purpose of the notice, which is to give to the city the opportunity to investigate both the claim

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and the claimant while the occurrence is recent and the evidence available. *Frasier v. Cowlitz County*, 67 Wash. 312, 121 Pac. 459; *Lindquist v. Seattle*, 67 Wash. 230, 121 Pac. 449; *Wagner v. Seattle*, 84 Wash. 275, 146 Pac. 621.

While the statute is mandatory in its only independent requirement, namely, that the notice give the place of residence of the claimant, it contains no provision that the notice shall be verified at all. That requirement is found in the charter provision alone. We have repeatedly held that a substantial compliance with such charter provisions is all that is required. *Lindquist v. Seattle*, *supra*; *King v. Spokane*, 52 Wash. 601, 100 Pac. 997; *Falldin v. Seattle*, 50 Wash. 561, 97 Pac. 658; *Hammock v. Tacoma*, 40 Wash. 539, 82 Pac. 893; *Ellis v. Seattle*, 47 Wash. 578, 92 Pac. 431; *Wagner v. Seattle*, *supra*; *Born v. Spokane*, 27 Wash. 719, 68 Pac. 386. With this construction before it, the legislature did not declare the charter requirements mandatory, but only its own added requirement. This is as true of the verification as of any other charter provision. While the charter requires that the claim be verified, we have never held that it must be verified upon the exact date when it is filed. We have clearly intimated the contrary. *Bell v. Spokane*, 30 Wash. 508, 71 Pac. 31.

It seems to us, therefore, that it would be carrying the mandatory provision of the statute farther than was ever contemplated by the legislature to hold that the claim must be verified upon the exact date of filing. Since the sole purpose of the filing of the claim is to give notice to the city and enable it to investigate both the claim and the claimant while the facts are comparatively recent, it is obvious that any *bona fide* effort on the part of the city to avail itself of the notice by making an investigation will, in any case, develop the fact that the claimant either did or did not reside at the place given in the notice at the time when the claim was filed. This meets every purpose of the act. *Wagner v. Seattle*, *supra*. If it then transpires that the claimant did not reside

at the given place when the claim was filed, proof of that fact would invalidate the notice and defeat the action. On the other hand, if it be found that he did then reside at the given place, the city can reap every benefit which such a notice, whensoever verified, could confer. If the city ignore the notice and make no investigation, it is in no position to complain, whatever the fact. *Ellis v. Seattle, supra*.

No valid reason has been, or can be, advanced for a more strict construction of the requirement engrafted upon the charter provisions by the statute than that accorded to those found in the charter alone. On the contrary, the very fact that it is mandatory and unavoidable calls for a reasonable construction, in the light of its plain purpose, unless we are to regard the statute as a pitfall rather than a precaution. What we said in *Lindquist v. Seattle, supra*, is just as pertinent to this statute as it is to the provisions found in the charter itself:

"The obvious purpose of the charter provision is to insure such notice as will enable the city, through its proper officials, to investigate the cause and character of the injury while the facts are comparatively recent, and thus protect itself against fraudulent or exaggerated claims. This court, in common with many others, has held that, where there is a *bona fide* effort to comply with the law, and the notice filed actually accomplished the purpose of the notice as to the place and character of the defect in the street, it is sufficient though defective, if the deficiencies therein are not such as to be actually misleading. *Ellis v. Seattle*, 47 Wash. 578, 92 Pac. 431; *Hammock v. Tacoma*, 40 Wash. 539, 82 Pac. 893; *Falldin v. Seattle*, 50 Wash. 561, 97 Pac. 658. This court has also held that claims of this character are to be viewed with at least that liberality which is accorded to a pleading. *Hase v. Seattle*, 51 Wash. 174, 98 Pac. 370, 20 L. R. A. (N. S.) 938. These, and many other decisions which might be cited, show that this court has never adopted that Draconic strictness of construction which would sacrifice the just and reasonable purpose of the law to a technical exactness of terms, making it a pitfall for the ignorant and unskillful,

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rather than a reasonable protection against the fraudulent and designing."

The judgment is reversed and the cause is remanded for further proceedings.

All Concur.

[No. 12565. Department One. July 29, 1915.]

W. H. WISER, *Appellant*, v. NORTHWESTERN IMPROVEMENT COMPANY, *Respondent*.¹

APPEAL—REVIEW—PRESUMPTIONS. Upon appeal, a judgment *non obstante veredicto* will be presumed to have been entered upon the grounds stated in the motion, in the absence of any indication to the contrary.

PLEADINGS—ISSUES, PROOF AND VARIANCE—FAILURE OF PROOF—FOOD—SALES OF IMPURE FOOD. In an action for damages through the alleged negligent sale of impure food, a verdict for the plaintiff cannot, in the absence of any evidence of negligence, be sustained upon the theory of liability under the pure food law, where there was no issue in the pleadings founded upon that act.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered July 11, 1914, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

Pruyn & Hoeffler, for appellant.

Hayden, Langhorne & Metzger, J. W. Quick, and John H. McDaniels, for respondent.

CHADWICK, J.—Respondent is charged by appellant in that it "carelessly, negligently and knowingly" sold to appellant for immediate consumption food that was impure, unwholesome and poisonous.

Respondent is engaged in the mercantile business at Cle Elum. In the regular course of its business, it sold to ap-

¹Reported in 150 Pac. 619.

pellant two cans of cove oysters. "Cove Oysters" is a trade-name for oysters cooked in cans, sealed and labeled for general distribution to the trade. It is a manufactured product. Appellant became sick soon after eating the contents of one of the cans. His symptoms indicated ptomaine poisoning. His condition was acute for about three weeks, and, whether from the ptomaine poisoning or in consequence of a foreign and malignant growth upon the lower bowel induced or aggravated thereby, has since been ill.

At the close of plaintiff's case, respondent moved for a nonsuit upon several grounds; that the evidence was insufficient to sustain a verdict; and further, that the pure food law, ch. 211, Laws 1907, p. 478 (Rem. & Bal. Code, § 5453 *et seq.*; P. C. 195 § 1), is violative of art 1, §§ 3 and 12, and art. 2, § 19 of the constitution. This motion was overruled. The case went to the jury, which returned a small verdict in favor of appellant. Thereupon respondent moved for judgment *non obstante*, upon the ground "that said verdict is unsupported by and contrary to the evidence that was introduced at the trial of this cause; and that there was not sufficient evidence or any evidence establishing any cause of action in favor of the plaintiff and as against the defendant." This motion was granted.

Appellant seems not to contend that his action can be sustained under his plea of negligence. He does, however, insist that the action was brought under the pure food law; that the case was tried under it, and that the court in passing upon the motion for judgment notwithstanding the verdict, held the law, in so far as it touches the facts of this case, to be unconstitutional.

As hereinbefore suggested, the pleadings do not bring the case within the pure food law. The motion for judgment *non obstante* does not touch the constitutionality of the act. Nor does the judgment indicate that it was entered upon any ground other than the one set up in the motion. We must presume, therefore, that the judgment follows the motion

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upon which it is founded. The only mention of the pure food law in the record is in the motion for a nonsuit, which was overruled.

Under the record as we have it, the words of the court in the case of *Fletcher v. Carstens Packing Co.*, 81 Wash. 241, 142 Pac. 694, are apt and controlling:

"The character of the action is to be determined from the allegations of the complaint, which alleged, as the only basis for recovery, the negligence of the respondent in selling diseased meat unfit for human food. No mention was made of the pure food statute, nor was any violation of it charged. The case to be submitted to the jury was the one framed by the pleadings and not some other. If respondent desired to submit an issue upon the violation of the pure food act, he should have pleaded and proved it. . . . We have in this state a statute known as the factory act, providing for the guarding of dangerous machinery. Any workman injured through the negligence of his employer because of the unguarded condition of dangerous machinery could, until the workmen's compensation act went into effect, maintain a common law action for negligence, or he might sue under the factory act. But having selected his form of action, he must abide by it. He could not found his action upon common law negligence, and recover for violation of the factory act. The same principle is applicable here. Whatever remedies may have been afforded respondent because of the act of appellant in selling him diseased meat, the eating of which caused him injury, he selected the common law form of negligence and he must abide by it."

Affirmed.

MORRIS, C. J., MOUNT, and HOLCOMB, JJ., concur.

[No. 12642. Department One. July 29, 1915.]

M. C. LORD, *Respondent*, v. DAVID H. MILLER *et al.*,
Appellants.¹

SALES—OPTION—ACCEPTANCE—ACTION UPON. Where an option to purchase machinery was acted upon by the purchasers, who took possession, dismantled and removed it from its previous location, changing its condition and status and destroying the identity of some of it, the option was accepted and the vendor could enforce payment of the agreed purchase price.

PLEADING—MATTERS IN EVIDENCE—AFFIRMATIVE ANSWER—NECESSITY. In an action for breach of defendant's contract to furnish the money for a joint venture in purchasing and reselling certain property, the defendant, upon admitting the contract and denying its breach, is not entitled to show, as excuses for nonpayment, that the payment was not to be made until delivery of the property at Seattle, that such delivery could not be made within the time allowed by reason of failure of transportation, and that the title to the property was defective by reason of liens against it; since they were special matters in defense, to be affirmatively pleaded.

CONTRACTS—RESCISSION—GROUNDS—CLAIM OF DEFECT IN TITLE. Rescission of an agreement to furnish the money to purchase certain property is not warranted by the fact that certain bondholders had threatened to establish liens or title of some kind to the property, in the absence of evidence of any actual defect or *bona fide* claim sufficient to dispossess the purchaser, or at least to have had some substance and color in law or equity.

Appeal from a judgment of the superior court for King county, Albertson, J., entered September 12, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Preston & Thorgrimson, for appellants.

Elias A. Wright and *Sam A. Wright*, for respondent.

HOLCOMB, J.—Respondent sued for damages for an alleged breach of an agreement between respondent and appellant David H. Miller, and a verdict by the jury for \$4,000 in favor of respondent was reduced by the court, on motion

¹Reported in 150 Pac. 631.

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for new trial, to \$2,000, for which amount judgment was entered.

There were, in fact, two separate agreements on which respondent's action devolved. The direct agreement between respondent and Miller was evidenced by a writing set out at large in the complaint. By this agreement, executed July 24, 1913, recital was made that the parties had agreed to a joint venture for the purchase and resale of the property and property interests of the Michigan-Alaska Development Company, consisting of a railroad, railroad cars, and equipment, telephone line, wharf, stock, tools, machinery and equipment in and about the premises, buildings at Homer, Alaska, and at the mines, sawmill, household goods, office furniture and fixtures, live stock, merchandise in store, etc. It was agreed, in short, that Miller should furnish the necessary money for the purchase, dismantling, shipment, resale, or other disposition of all the above described property; that respondent should, as soon as convenient and proper, proceed to the location of the property and, with all possible despatch, dispose of the property to the best advantage of both parties; that if it should be deemed best and most advantageous, respondent could dismantle and ship the property from the place where it was located, for disposition or sale; that respondent should use the money to be furnished him by Miller exclusively in the prosecution of the enterprise, unless authority to use it otherwise be given by Miller in writing; that respondent should give his attention to and use his best efforts, skill and powers for the joint interests, profit, and advantage of the parties; that each party should receive fifty per cent of the net profits of the enterprise. The other agreement, also made July 24, 1913, was an option agreement between these parties and the Michigan-Alaska Development Company, whereby these parties paid \$110, as earnest money and as part of the purchase price, to the Michigan-Alaska Development Company, of all the personal property of that com-

pany in Alaska, the purchase price being \$4,500, and the option to be completed in ninety days.

The appellants went to trial on general denial of respondent's allegations, except they admitted the contract as pleaded. The breach complained of was that Miller never did complete the purchase under the option within the time stipulated, but allowed the same to lapse. The evidence on the part of respondent at the trial went further and tended to show that Miller did in fact, shortly after the expiration of the option period, pay the remainder of the purchase money to the Michigan-Alaska Development Company, and resold a part of the property at a profit. He had caused the part sold to be brought to Seattle, but left a large part of the property in Alaska.

Appellants contend, *inter alia*, that the trial court did not submit the case to the jury on the proper theory, and erred in instructing the jury that the option agreement, being accepted by these parties, constituted a contract which was enforceable against these parties by the Michigan-Alaska Development Company, and that it could have required them to pay the balance of the \$4,500 purchase price within a reasonable time after the expiration of the ninety days; that by virtue of the contract sued on between Miller and Lord, whereby the purchase price was to be paid the Michigan-Alaska Development Company by Miller within ninety days, if he failed to pay it as agreed, and Lord lost anything by reason of Miller so failing to pay the purchase price of the property, then Lord would be entitled to recover the amount of his loss. Appellants argue that "the question of fact for the jury to decide, of whether there had been the breach alleged, was thus taken away from them," and "in any event, it was error for the court to instruct that the contract between the vendor and the partners was enforceable absolutely."

While it may have been immaterial to the issues, it certainly is correct that, under the circumstances proven in the case, to the effect that respondent immediately took posses-

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sion of the property in Alaska, dismantled and removed it from its previous location, and prepared it for shipment, thus changing its condition and status, and destroying even the form and identity of some of it, the vendor could enforce payment of the agreed purchase price. Nothing could, legally, be more obvious. The recognition of this legal liability doubtless induced appellants to pay the vendor after the option expired. Under undeniable legal principles, it certainly could not prejudice appellants to instruct the jury that the option was accepted and acted upon by the appellants and respondent, and was enforceable against them. Appellants further insist that the evidence incontrovertibly shows facts sufficient to support a rescission.

The contention that, by the foregoing instructions, the court excluded from the jury's consideration the question of whether or not a breach of the contract between these parties had occurred, is untenable. There was no affirmative matter in avoidance pleaded by appellants. Their answer denied the nonpayment of the purchase price and allowance of the option to lapse. At the trial, however, appellants admitted the nonpayment of the balance of the purchase price, and further stated that they "were not in position to pay it previous to October 24, 1913." They sought to show that the reason why they did not complete the payment was, (1) that the payment was to be completed only on the delivery of the property intended to be shipped at Seattle; (2) that, by reason of the failure to obtain transportation, the property could not be delivered in Seattle before October 24, 1913; and (3) that the title to the property was defective in that there were liens of some kind against it. As to these propositions, the contract having been admitted, they were special matters in avoidance and should have been, as the court intimated, affirmatively pleaded. Rem. & Bal. Code, § 264 (P. C. 81 § 235); 31 Cyc. 215, 680-1.

The contract pleaded and admitted, and the option instrument indicated, no contemplation of the parties, either to the

option or to the agreement between these parties, that the payment was only to be made by appellants on receipt of the goods in Seattle. On the contrary, the contract between these parties plainly stipulated that "if it be deemed best and most advantageous to dismantle and ship from the present location for disposition and sale, then said first party [respondent] will proceed with all diligence to have said property shipped." In case, therefore, it had not "been deemed best and most advantageous to dismantle and ship the property from Alaska," appellants would never be bound to pay the purchase money. Obviously such was never the intent of the parties. The option instrument was silent as to *where* the purchase money was to be paid, but was explicit as to *when* it was to be paid. It was to be paid by appellants in ninety days from July 24, 1913. Where the property was situated at that time was, as the court below indicated, immaterial. Nor was it material that one certain transportation company refused to receive and transport the property within the life of the option. It is a peculiar fact that, shortly after the option expired, appellants were able to procure transportation for about half the goods, caused them to be brought down from Alaska, resold them, and paid the agent for the vendor, who accepted the purchase money. The averment and admission of the contract, the averment and showing of complete performance thereof on his part by respondent, the showing and admission that appellant Miller failed to perform as agreed the one specific thing by him to be performed, constituted a complete *prima facie* right to recover by respondent such damages as he proved. Any reasonable and valid excuse on his part for the default by appellant Miller was for him to affirmatively aver and prove. The court, however, admitted all the evidence offered tending to excuse the appellant Miller for his default. But it refused to instruct the jury, as requested by appellants, that "before plaintiff can recover he must show that the option was not carried out through the fault of the defendant; it will not make out a *prima facie* case merely to

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show that the option was not consummated." There was only hearsay evidence, the most remote and conjectural, that "eastern bondholders had threatened suit to establish liens or title of some kind to the property in Alaska," by reason of which a transportation company had refused to receive and transport the goods from Alaska. This was not evidence of any actual defect in, or incumbrance upon, the title to the property. Totally irresponsible parties, holding no semblance of a valid claim to, or lien upon, the property, might have threatened such suit. To have avoided the sale, the claim of lien or title must have been *bona fide* and sufficient to dispossess the purchaser, or at least have had some substance or color in law or equity to warrant a rescission of the executory contract, and not a mere assertion. 35 Cyc. 416. There was no such claim, defect, or cloud shown in this case. Hence, there was no risk and no failure of the joint enterprise by reason thereof.

Under the pleadings and the proofs, we think there was no error in refusing to instruct as requested by the appellants, nor in instructing as complained of. The other instructions requested by appellants and refused by the court were mere elaborations of those herein mentioned, and come under the observations here made.

We perceive no error. Judgment affirmed.

MORRIS, C. J., PARKER, MOUNT, and CHADWICK, JJ., concur.

[No. 11999. Department One. August 4, 1915.]

W. E. WELDON *et al.*, *Appellants*, v. CHARLES DEGAN *et al.*,
Respondents.¹

CONTRACTS—CERTAINTY—CORPORATIONS — AGREEMENT TO ORGANIZE. An agreement to organize a corporation, with a stated capital stock, to be equally divided among the parties, each of whom agrees to forfeit \$2,500 in case of his default in completing the agreement, is not sufficiently definite in its terms to be binding to the extent of recovery of damages for its breach.

EQUITY—MAXIMS. The maxim, *Id certum est quod certum reddi potest*, cannot be applied to supply by parol that which the law presumes to have been purposely omitted from a written contract.

EVIDENCE—PAROL—TO VARY WRITING. Where a written agreement to organize a corporation is lacking in everything other than the purpose of the organization, the amount of capital stock, and the proportion in which it was to be contributed, resort cannot be had to oral evidence of a prior or contemporaneous agreement supplying the statutory essentials for the formation of a corporation prescribed by Rem. & Bal. Code, § 3679.

Appeal from a judgment of the superior court for King county, French, J., entered November 26, 1913, upon granting a nonsuit, dismissing an action on contract. Affirmed.

McClure & McClure and *Walter S. Osborn*, for appellants.

Brightman, Halverstadt & Tennant, for respondents.

CHADWICK, J.—The plaintiffs and the defendant Charles Degan, after some preliminary negotiations, met at the city of Chicago, Illinois, on the 18th day of September, 1911, and signed the writing following:

"It is hereby agreed and understood by the signatories of this document that a corporation will be formed on or about the first day of May, 1912, with a proposed capital of 80M. to be contributed equally by the signers hereto, for the purpose of manufacturing shoes. It is further understood that each signer holds himself firmly bound to the others to consummate this corporation, and in default of completing the

¹Reported in 150 Pac. 1184.

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agreement and declining to become a member of the corporation, as above agreed, forfeits to the steadfast signatories the sum of twenty-five hundred dollars. In witness hereunto we set our hands and seal this 18th day of September, 1911."

In March, 1912, the defendant Degan notified the plaintiffs that he would not become associated with them in the suggested enterprise. A formal demand was made upon him, and upon his refusal, this action was brought to recover the sum of \$2,500 as liquidated damages.

It is the theory of the plaintiffs that the contract is binding under the maxim, *Id certum est quod certum reddi potest*. Plaintiffs alleged in their complaint, and accordingly submitted testimony to prove, that it was understood, at the time the writing was executed, that the place of business of the corporation was to be Milwaukee, Wisconsin; that each of the parties would be directors of the company; that the capital stock of the corporation would be \$100 per share. Two of the plaintiffs testified to actual damages. One of them sold his home in the state of Texas and arranged to move to the city of Milwaukee, and he actually paid out the sum of \$250 making preparations for the new venture. The other expended about \$300 for the same purpose. They also proved that defendant was a man of long experience and influence in the shoe manufacturing business, and that his services would have been of great value to the proposed concern.

When the plaintiffs had rested their case, the court sustained a motion for a nonsuit, upon the theory that the writing was not a contract, in that it was too indefinite and uncertain in its terms to warrant a recovery. From the judgment entered upon the motion, plaintiffs have appealed.

Upon the main question, counsel submit a number of authorities to sustain the proposition that,

"An agreement cannot be held uncertain if the courts can see what the parties intended and enforce the same. An agreement drawn up by illiterate persons will not be held

uncertain, if it is possible for the court to ascertain their meaning. Absolute certainty is not required. That is certain which may be rendered certain." 9 Cyc. 250.

It is said that the words "organize" and "organization," when used with reference to an agreement to form a corporation, mean and include all of the incidents pertaining to the organization of such corporation, including the names and number of directors, the names of the officers, the division of the capital stock, the adoption of by-laws, as well as all other incidents necessary to endow the legal entity with a capacity to transact the business for which it was created; the words "form" and "consummate" are declared to be words of equivalent meaning, and under this rule and the maxim relied on, it was competent for the plaintiffs to allege and prove that it was the intention of the parties to do business at Milwaukee; that each of them were to be directors, and the other items pertaining to the organization to which we have referred. To sustain this proposition, plaintiffs put their principal reliance upon the cases of *Electric Fireproofing Co. v. Smith*, 99 N. Y. Supp. 37; *Childs v. Smith*, 55 Barb. (N. Y.) 45; *Kirschmann v. Lediard & Ree*, 61 Barb. 573, and certain Wisconsin cases, being *Kipp v. Laun*, 146 Wis. 591, 131 N. W. 418; *Inglis v. Fohey*, 136 Wis. 28, 116 N. W. 857, and *Becker v. Holm*, 89 Wis. 86, 61 N. W. 307, in which other cases relied on are cited.

It would serve no purpose for us to review in detail all of these authorities. It is enough to say that the cases most in point are the three New York cases. These were cases where a party having a salable thing entered into a contract with other parties to form a corporation, the parties of the second part assuming the burden of perfecting the organization, giving the plaintiff a certain number of shares of the capital stock. It would seem to us that the conclusion would necessarily follow, upon suit brought by the party having the salable thing to recover damages for breach of contract, that he would be entitled to recover, and that defendants

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would not be heard to say that the contract could not be enforced because all of the details attending the formation of the corporation were not set out in the agreement, for, by the terms of the engagement, he would have nothing to do with the detail of organization.

This is a case between parties having the same interest and the same relation to the proposed concern. The contract is lacking in everything other than the purpose of the organization, the amount of capital stock, and the proportion in which it was to be contributed. There is nothing in its terms that would bind a minority of the number signing the writing to the organization of a corporation under the laws of any particular state, if he were unwilling and refused to consent thereto or to any other detail that was omitted.

The place where a corporation is organized is, or may be, a matter of great importance, for it is a matter of common knowledge, of which courts may take judicial notice, that the laws of the various states vary widely in defining the rights and liabilities of stockholders. They likewise differ in providing for the number and responsibilities of trustees or directors. In some of the states there is no personal liability attaching to a subscriber to the capital stock of a corporation. In others a subscriber is liable upon his subscription. In some there is a double liability.

It seems to us that the agreement is not sufficiently definite in its terms to be binding upon any one of the parties to the extent that they could be called upon to pay damages to the other parties, either actual or liquidated. In the case of *Rudiger v. Coleman*, 98 N. Y. Supp. 461, there was an agreement that

“A corporation shall be formed for the purpose of quarrying and selling granite, and the execution of contracts in which granite is used, consisting of all the parties hereto, in accordance with a certificate and by-laws, a copy of which by-laws is hereto annexed.”

An action was brought for specific performance. It was held:

"The judgment cannot be sustained. It is not within the province of equity jurisdiction to compel the specific performance of a contract to form a corporation under the circumstances disclosed by this case. The parties were unable to agree upon the terms for the formation of such corporation, and are now hostile and unfriendly. Annexed to the agreement there is a proposed set of by-laws, but they contain little, if anything, showing the terms and details of the proposed incorporation. It follows that the judgment could not be enforced if the parties refuse to comply with it, and for that reason is objectionable in form and substance."

The so-called contract is no more than an agreement for an agreement, or, in other words, an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete, and to which any one of the parties might object if proposed. To strip the case down to its framework, the agreement relied on is nothing more, and appellants' argument rests entirely upon the idea that a minority of those signing it would be bound by the subsequent will of the majority pending the organization.

For these reasons, the maxim quoted does not apply. This maxim may be resorted to to clarify a contract—to gather the true intent of the parties from what is expressed—but to invoke it to supply a material omission would be to pervert and misapply it. Its use is to ascertain the meaning of the words and terms employed, not to make a contract.

If a contract be uncertain in any of its essentials and can be made certain by reference to a certainty, it is enough.

"For instance, although every estate for years must have a certain beginning and a certain end, 'albeit there appear no certainty of years in the lease, yet, if by reference to a certainty it may be made certain, it sufficeth.'" Broom, *Legal Maxims* (8th ed.), p. 478. Co. Litt. § 58, 45 b.

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But although it is alleged, and the plaintiffs have so testified, that the place of organization and the place of doing business, as well as the manner of doing it, the par value of the shares, and the directors, had been previously or contemporaneously agreed upon, not one of these details were mentioned in the contract. The resort to oral testimony is not had to make certain something that was agreed upon and inartificially expressed, but to supply something alleged to be agreed upon and which, in the absence of a showing of fraud or mistake, the law will presume was omitted purposely. To illustrate: let us suppose that the writing was complete in all things except the place of organization; that it actually provided that the concern was to do business in Milwaukee. In such case, the right of the parties to show that the parties intended to do business in Milwaukee, Wisconsin, would not be questioned. The uncertainty would be made certain by reference to a certainty.

"So, to be enforceable, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as the result of future negotiations." 6 R. C. L., p. 617, par. 38.

"The contract must be certain and unequivocal in its essential terms either within itself or by reference to some other agreement or matter. In addition to a definite promise, the subject-matter of the agreement must be expressed in such terms that it can be ascertained with reasonable certainty. A contract which is so uncertain in respect of its subject-matter that it neither identifies the thing by describing it, nor furnishes any data by which certainty of identification can be obtained, is unenforceable." 6 R. C. L. p. 644, § 59.

Nor do the cases relied on by appellants violate this doctrine. They admit it. After reciting one of the exceptions to the rule that excludes parol evidence when offered to add to, modify, or contradict a writing,

"If the writing is shown by competent evidence to have been a mere part of an entire oral contract, and the oral

contract is not inconsistent with and does not contradict the writing, and the writing does not on its face plainly purport to contain the entire contract, then parol evidence of the oral contract is admissible;”

the supreme court of Wisconsin says, in the case of *Kipp v. Laun*, *supra*:

“A case cannot be brought within the first exception by oral evidence of the language used by the parties in their negotiations or in their alleged contract, where relief is not sought on the ground of fraud or mistake and the parties stand upon the contract and do not seek a rescission or reformation.”

So in *Bean v. Clark*, 30 Fed. 225, a case relied on and of which counsel says,

“It was held that a memorandum though *inartificially drawn, obscure and capable of different interpretations in several particulars, yet its provisions embracing though in very inadequate terms, every matter which the parties had definitely agreed to* and the circumstances surrounding its execution being consistent with no other conclusion, is a completed agreement and not merely an agreement to agree.”

We have italicized the words which mark the distinctions between this case and those cited by appellants. Here there is nothing obscure or capable of different interpretations, nor does the writing contain every matter upon which it is now insisted that there was a definite agreement. It is a clear case of omission, and no fraud or mistake being alleged, we are held, in construing it, to the general rule.

Courts may find out and declare a contract if there be any ground upon which to rest its inquiry, but it cannot assume to arrange the details of its performance, unless such details are of such nature that it can properly fix and enforce them. The only exception to the rule, now occurring to us, seems to be where the parties have entered into a contract for a certain term, agreeing to renew it at the end of the term upon terms to be then agreed to. In such a case, a court of equity will, after performance and in the event of a

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refusal to renew or disagreement as to details, define the relation of the parties for the extended term. It will treat the details as a matter of form and not of substance, and will settle them "if they are of a nature which courts may properly fix or settle." *Joy v. St. Louis*, 138 U. S. 1; *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 29 Fed. 546; *Slade v. City of Lexington*, 141 Ky. 214, 132 S. W. 404, 32 L. R. A. (N. S.) 201.

While it is insisted by counsel for appellant that the case of *Watson v. Bayliss*, 71 Wash. 499, 128 Pac. 1061, is to be distinguished upon its facts, yet we are of the opinion, nevertheless, that the rule announced applies with equal force to the facts in this case. We cannot agree with counsel that, although there were omissions in that case, the contract in this case contained the "vital essentials" of a contract, "And in addition, the number and personnel of the board of directors and the place of business of the corporation, and the par value of the capital stock." The things "in addition" are not in the contract and are only brought into the case by violating the rules to which we have referred, and in so far as the place of business is concerned, by violating the further rule that, in the absence of a stipulation to the contrary, the law will presume that the contract was to be performed in, and with reference to the laws of, the state where made.

Neither is the case to be distinguished because the contract in the *Watson* case was oral. If the contract were sufficiently definite it would make no difference whether it was oral or written. A contract is a meeting of minds. A writing is not a contract; it is no more than evidence of a contract. In the *Watson* case, it was held that a party cannot be made to answer in damages for a failure to consummate a formal contract, if the parties are thereafter unable to agree upon the essentials of the enterprise. We said, referring to our own statute, which we opine does not change the principle,

"Our statute, Rem. & Bal. Code, § 3679, provides that any two or more persons, who may desire to form a company for one or more of the purposes specified in § 3677, shall make and subscribe written articles of incorporation; that these articles shall state (1) the corporate name; (2) the objects for which it is formed; (3) the amount of its capital stock and the number of shares of which it shall consist; (4) the time of its existence; (5) the number of trustees and their names; and (6) the name of the locality in which the principal place of business of the company is to be located. There is no allegation that any of these matters were agreed upon, other than the object of the corporation. It is elementary that, without a meeting of minds upon all the essentials of a contemplated contract, there is no binding agreement. Our statute treats all the matters enumerated above as essential to the organization of a corporation. Whether one or two of these elements might be omitted we need not inquire. It is obvious, however, that the amount of capital stock, the number of shares of which it shall consist, and the number of trustees and their names, are among the vital essentials of a corporation. It is through its trustees that a corporation is managed, and its capital stock is the very basis of its being.

"If any portion of the proposed terms [of the contract] are not settled or a mode agreed upon by which they may be settled, there is no agreement.' 9 Cyc. 245.

"See, also, 30 Cyc. 357; *McDonnell v. Coeur D'Alene Lum. Co.*, 59 Wash. 698, 110 Pac. 18; *Pasco Reclamation Co. v. Cox*, 70 Wash. 549, 127 Pac. 107; *Loewenberg v. De Voigne*, 145 Mo. App. 710, 123 S. W. 99.

"In the *Loewenberg* case, in considering a similar question, the court said:

"How would the court ascertain the essentials which must be in articles of association, from a contract that neither specifies the amount of capital or the number of shares into which it should be divided, nor the amount proposed to be paid in on incorporation? Who shall constitute the first board of directors? Even the division of the shares among the incorporators or subscribers is unnamed. These are all among particulars which our statute requires shall be set out in the articles.' "

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It will thus be seen that if the contract be lacking in any of the essentials—and it is not denied that the writing in this case is so lacking and is not complete without oral evidence—it is not binding upon the parties. The only difference between the *Watson* case and the case at bar is, that in the *Watson* case an improper and ulterior motive, at the time the contract was entered into, is charged to the defendant. In this case, the wrongful intent to breach the contract is alleged to have been subsequently formed and acted upon.

We have given the case of *Watson v. Bayliss* unusual consideration because of the insistence of the eminent counsel for appellants, but we are unable to distinguish it. Upon the general principle, therefore, that the maxim quoted cannot be resorted to to supply an omission of elements essential to a contract, and upon the authority of our own decision, the judgment of the lower court is affirmed.

MORRIS, C. J., CROW, and PARKER, JJ., concur.

[No. 12019. *En Banc*. August 4, 1915.]DEXTER HORTON NATIONAL BANK OF SEATTLE, *Respondent*,
v. WASHINGTON-ALASKA BANK *et al.*, *Appellants*.¹

CORPORATIONS—STOCK—PLEDGE OF STOCK—EVIDENCE—SUFFICIENCY.

A pledge of mining stock as collateral security for advances made by one bank to another is sufficiently established by an indefinite oral agreement to the effect that the stock, left in possession of the pledgee, was to be held to protect the pledgee for advances made to the pledgor pending negotiations for an extensive credit or permanent loan, which failed of consummation; especially in view of the subsequent attitude of receivers of the pledgor, in litigation with the pledgee, whereby the receivers established by a judgment that the advances were made solely in consideration of such pledge of the stock as collateral security, which exceeded in value the amount of the advances; and thereafter, by virtue of such judgment and claim of collateral, the receivers contracted with the pledgee with reference to the stock on the assumption that it had been pledged and was held as collateral.

JUDGMENT—RES JUDICATA—MATTERS CONCLUDED. Where receivers of an insolvent bank impounded money in transit that had been sent to a creditor bank to apply on overdrafts and advances, a judgment in favor of the receivers, based on their claim that the advances had been made on the sole consideration of mining stock theretofore pledged therefor and then held by the creditor bank as collateral security exceeding in value the amount of the advances, is conclusive that the mining stock had been pledged by the insolvent as collateral for the advances, and precludes the receivers from making a contrary claim in subsequent litigation to foreclose the pledge.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 16, 1914, in favor of the plaintiff, in an action to foreclose the lien of a pledge, tried to the court. Affirmed.

Lyons & Orton and *Hughes, McMicken, Dovell & Ramsey*, for appellants.

Peters & Powell, for respondent.

MORRIS, C. J.—This is an action to determine the rights of the parties in ninety-six shares of the capital stock of the

¹Reported in 150 Pac. 1176.

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Gold Bar Lumber Company, respondent claiming to hold this stock as a pledge for an indebtedness of \$104,465.62, with accrued interest, and praying for foreclosure. Appellants deny the pledge, claiming the stock was left with respondent only for safe-keeping, and pray for its re-delivery. The judgment of the lower court established the indebtedness at \$126,907.80, sustained the pledge, and ordered its foreclosure.

Prior to October 1, 1910, there were two banks at Fairbanks, Alaska, one known as the Fairbanks Banking Company, and the other as the Washington-Alaska Bank. On October 1, the Fairbanks Banking Company took over all the assets of the Washington-Alaska Bank, and thereafter the consolidated banks were known as the Washington-Alaska Bank. On January 5, 1911, the Washington-Alaska Bank was declared to be insolvent and two receivers were appointed, both of whom were displaced prior to the commencement of this action by F. G. Noyes, the present receiver. Prior to August 1, 1910, the Seattle correspondent of the Alaska banks was the Washington Trust Company, which on that day consolidated with the respondent, and the account of the two Alaska banks was transferred to respondent, the respondent thereafter acting as the Seattle correspondent of the Alaska banks. To avoid confusion the Alaska banks will hereafter be referred to as the appellant, and the Seattle bank as the respondent.

In order to properly conduct its banking business during the winter months, it was necessary for appellant to obtain a large credit with respondent or other outside banks, and in order to secure this winter credit, it had been customary for several years for E. T. Barnette, the president of appellant, to guarantee the overdraft in some form mutually satisfactory, and also by pledging the Gold Bar stock as collateral. Prior to the transaction here involved, Barnette had resigned as president of appellant and had removed to California. His resignation, however, had not yet been accepted

and he was still nominally the president of appellant. This was the fact prior to the consolidation of the Seattle banks, the main issue now being whether or not the Gold Bar stock was so pledged with respondent after the consolidation of the Seattle banks. The Gold Bar stock first came into possession of respondent on September 15, 1910, when it was brought to the bank by one Armstrong at the request of Barnette, and receipt was issued reciting that it held the stock subject to the order of Barnette. There was no indebtedness between appellant and respondent at this time, and the evidence discloses no purpose for leaving this stock with respondent, unless inferentially it might be convenient if it should be necessary to make use of it as collateral.

In December, 1910, Mr. Jackson, vice president and manager of appellant, came to Seattle to arrange for the customary winter credit. He brought with him a power of attorney issued by appellant, concerning which no question is raised, authorizing him to pledge the Gold Bar stock or make any other use of it in order to obtain the necessary winter credit. This power of attorney is very full, and under it Jackson's authority to pledge the stock could not be questioned. Jackson says he had two plans in view, one to secure the indorsement of Barnette, then residing at Los Angeles, and the other the pledge of the Gold Bar stock. Jackson had several interviews with Mr. Parsons, representing the respondent, in which they discussed the amount of overdraft appellant would require, which was fixed by Jackson at the sum of \$250,000. Parsons was unwilling to accede to so large a credit. Jackson finally left for California to interview Barnette in regard to the matter, requesting respondent to honor all drafts of appellant during his absence and pending final negotiations. We quote from his testimony: "Just the exact words I cannot remember. I did not put much thought to it at the time; stating he was protected by the Gold Bar stock." Jackson returned to Seattle with Barnette on December 14. They went to the respondent bank

and informed Parsons they were ready to close the matter up. Negotiations were continued until December 20, when Parsons informed Jackson and Barnette that respondent would not extend the overdraft as requested, which at this time had been increased to \$350,000. Jackson sought the aid of other banks, but being unable to arrange for the required credit, he notified the appellant and it closed its doors.

Both Parsons and Jackson are very indefinite as to what was the exact language in which the Gold Bar stock was pledged. They both say there is no question but that it was done, but fail to state how or when it was done. There was no written pledge, and the matter must rest upon these indefinite, numerous conversations that took place pending the negotiations for the overdraft. Parsons says that, about December 6, prior to Jackson's leaving for California, Jackson said to him, "In the meantime, if you will take care of our advances you shall hold the Gold Bar stock as collateral to the overdrafts and such advances as you may make, until such time as I perfect a definite and permanent loan for the \$250,000." It is difficult to state fairly within any small compass the testimony of either Jackson or Parsons, or to show just what was the mutual agreement between them as to the pledging of the Gold Bar stock. As before stated, they both agree that it was pledged, but their testimony seems to be based more upon their common understanding that such was the fact than upon any definite contract to that effect. The matter is rendered still more confusing by the fact that, subsequent to the failure of appellant, Parsons and Jackson endeavored to put in writing the result of their negotiations. The only reference to the Gold Bar stock in this writing is this: "Before Mr. Jackson left for Los Angeles, approximately December 6, 1910, he stated that he would see E. T. Barnette and arrange for a credit of \$250,000. In the meantime until he returned to Seattle, we [meaning respondent] would be fully protected on our advances by Gold Bar stock." Barnette testified that, so far as his knowledge goes, the Gold

Bar stock was not given as collateral, and that the respondent's relation to it never changed from that indicated when it was first left by Armstrong for safe-keeping subject to Barnette's order. As evidencing this, appellant produces an order written by Parsons December 21, 1910, in which Barnette directs respondent to deliver the Gold Bar stock "which I left with you for safe-keeping," to Jackson. Respondent's explanation of this order is that, after respondent declined to grant appellant the credit required, Jackson indicated his purpose to endeavor to formulate arrangements if possible with other Seattle banks, in which event, if successful, it was thought the Gold Bar stock would be required as collateral, and the indebtedness to respondent growing out of the advances it had already made would be paid in cash out of the credit established with such other banks. This arrangement if carried out would leave the Gold Bar stock to be held by respondent for safe-keeping, as under its original deposit, and Parsons desired, inasmuch as Barnette still held the original receipt, stating the stock was held subject to his order, to have written authority from him before turning it over to Jackson.

The confusion as to the real facts concerning the Gold Bar stock is cleared up, we think, by the subsequent attitude of the parties. The respondent has retained this stock under its claim of pledge from December, 1910, to the time this action was brought in April, 1913. During all this time the appellant and its receivers have acquiesced in its claim; at least it has never been disputed, nor has any attempt been made to obtain its possession. During the latter part of December, 1910, the appellant delivered \$101,000 to an express company of Fairbanks, Alaska, to be transmitted to respondent to apply as payment upon account. While this money was in transit and before it had passed from the jurisdiction of the Alaska courts, the appellant suspended and receivers were appointed, one of whom was the cashier of appellant. These receivers immediately sued out a writ of assistance,

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and under it obtained possession of the consignment. The respondent appeared in the proceedings growing out of this writ of assistance and set up title to the money and right to its possession. A hearing was had on this petition, at which time the receivers took the position, and sought to establish, that the respondent held this Gold Bar stock as collateral, respondent objecting to going into this upon the ground that it was immaterial. The receivers, however, insisted and the court ruled with them, and in its order and judgment denying respondent's claim to the money seized under the writ of assistance, it recites that the respondent held this stock as collateral. This holding was made upon the evidence then before the court, including telegraphic communications between the receiver and respondent, in which Hawkins, receiver, and prior to its insolvency, cashier of the appellant, testified that, upon his appointment as receiver, he desired to get the respondent to commit itself as to its relation to this Gold Bar stock, and accordingly wired it asking in what capacity it was held, to which respondent answered that it held it as collateral. The respondent appealed from the judgment denying its right to the money seized under the writ of assistance to the circuit court of appeals and, on February 5, 1913 (*Dexter Horton Nat. Bank of Seattle v. Hawkins*, 193 Fed. 363), the appellate court sustained the judgment of the Alaska court, reciting in its statement of the facts that the Gold Bar stock was held as collateral. That this question was material in that proceeding is evident. The receivers contended that respondent advanced credit to appellant solely upon the faith of the Gold Bar stock as collateral, and that the value of this stock far exceeded the amount due; while respondent contended its advances were made both upon the Gold Bar stock as collateral and upon the faith of the shipments that appellant agreed to make from time to time.

If the court had held with respondent that it made its advances partly upon the promise of appellant to remit to it

from time to time, respondent would have thereby been entitled to an equitable lien upon the money. If, however, the advances were made upon the collateral alone, there could be no such lien. The circuit court of appeals held that the receivers were entitled to stop the shipment in transit, for the reason that title would not pass to respondent until its receipt of the money, and that it was not entitled to any equitable lien for the reason that it had extended credit in the ordinary course of business, pursuant to an arrangement between the parties by which the Gold Bar stock was held as collateral, and not in reliance upon the faith of future shipments. The only arrangement between the parties indicated by the record in that case was the arrangement whereby the Gold Bar stock became collateral. No one sought to establish any other, nor did any one dispute it. Respondent's objection to showing this collateral agreement was upon the ground that, if established, it gave it no right to the money seized under the writ; that such right could only be enforced upon the theory of an equitable lien based upon its claim of advancing credit upon the faith of the shipment as well as upon the strength of the collateral.

Appellants' attitude is further shown by the fact that, on August 26, 1912, the present receiver made a showing to the Alaska court in which he recites that the respondent holds this Gold Bar stock as collateral, and prays for an order permitting him to enter into negotiations with respondent touching its ultimate disposition. The court made such an order, reciting as its basis that respondent held this stock as collateral, and the receiver came down to Seattle and entered into a contract with respondent reciting that the appellant is indebted to the respondent in the sum of \$129,465.62, and as collateral security holds ninety-six shares of the Gold Bar stock, which the receiver desired should not be sold nor converted into cash without his consent, or prior to June 1, 1913, to which respondent assents in consideration of the present payment of \$25,000, and the further promise of the receiver

to pay the balance of a fifty per cent dividend, with interest, as fast as he could obtain available funds, and before December 1, 1912.

No formal agreement is necessary to establish a pledge so long as the agreement be clearly expressed or implied, and while the testimony of Parsons and Jackson might leave the matter in some doubt, it is clear, we think, when aided by all the facts, that there was between them a distinct understanding that respondent was to retain the Gold Bar stock as collateral to any advances it might make pending the determination of the amount of credit it would extend to appellant. The nature of respondent's relation to this stock was more than an incidental, evidentiary matter in the proceeding in the Alaska court. It was one of the matters inquired into by the court to determine respondent's right to a lien upon the shipment of the money, and its right to such lien was denied because, first, it had made advances upon the sole credit of the Gold Bar stock, the value of which exceeded the amount due; and second, that the money was the property of appellant until actually received by respondent. Thus, not only was the relation of respondent to this stock determined, but it is made the basis in part of the court's refusal to grant it the relief it demanded. Under these circumstances, it was a conclusive establishment of the fact between the parties, and the subsequent action of the Alaska court, invested with jurisdiction over the insolvency proceedings, recognizes this fact by citing it as the reason for ordering the receiver to enter into negotiations with respondent to obtain this valuable stock for the benefit of the insolvent estate.

Upon the whole case, we agree with the lower court, and its judgment is affirmed.

CROW, ELLIS, MOUNT, MAIN, PARKER, FULLERTON, and HOLCOMB, JJ., concur.

[No. 12120. Department One. August 4, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v. G. W. BIELMAN,
Appellant.¹

INCEST—"KIN"—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 2455, defining incest as sexual intercourse between persons nearer of kin to each other than second cousins, whether of the half or whole blood, refers only to blood relations and not kindred by affinity; hence a man cannot be guilty of committing the offense with his stepdaughter.

INCEST—STATUTES—REPEAL—CONSTRUCTION. Rem. & Bal. Code, § 7151, prohibiting marriage in specified cases of kinship by affinity as well as by consanguinity, and defining incest as carnal knowledge between such persons, is repealed, so far as the subject of incest is concerned, by the penal code of 1909, which, by Id., § 2304, expressly repealed an earlier law (Id., §§ 2891, 2892) defining incest as sexual commerce between persons related within the degrees wherein marriage is prohibited; in view of Id., § 2455, of the penal code defining incest as being when the parties are nearer of kin than second cousins, thereby eliminating relationship by affinity, and § 2301 of the penal code declaring that no law is continued in force because it is consistent with this act on the same subject, but that, in all cases provided for by this act, all former statutes, whether consistent or not, are repealed unless expressly continued in force.

INCEST—DEFINITION—STATUTES—COMMON LAW. Rem. & Bal. Code, § 2455, defining incest as being when the parties were nearer of kin to each other than second cousins, excludes prosecutions under the common law.

Appeal from a judgment of the superior court for King county, Ronald, J., entered February 14, 1914, upon a trial and conviction of incest. Reversed.

John F. Dore, for appellant.

John F. Murphy and *Thomas J. L. Kennedy*, for respondent.

MOUNT, J.—The appellant was convicted of the crime of incest. He appeals from a judgment sentencing him to a term in the penitentiary.

¹Reported in 150 Pac. 1194.

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Opinion Per MOUNT, J.

The only question presented upon this appeal is the sufficiency of the information, the charging part of which is as follows:

"He, said G. W. Bielman, in the county of King, State of Washington, on the 11th day of December, 1913, did then and there wilfully, unlawfully and feloniously, carnally know and have sexual intercourse with one Nola Bielman, she, said Nola Bielman, being then and there the daughter of one Martha Bielman, who was then and there the wife of said G. W. Bielman."

It is stipulated in the case that Nola Bielman was the step-daughter of the appellant. It is contended by the appellant that this information does not charge the crime of incest, for the reason that there is no blood relation between the appellant and his step-daughter. Section 2455, Rem. & Bal. Code, provides:

"Whenever any male and female persons, nearer of kin to each other than second cousins, computing by the rules of the civil law, whether of the half or the whole blood, shall have sexual intercourse together, both shall be guilty of incest and punished by imprisonment in the state penitentiary for not more than ten years."

It is contended by the appellant that this statute refers only to persons who are blood relations nearer of kin to each other than second cousins, computing by the rule of the civil law. We think this contention must be sustained. The ordinary meaning of the word "kin" is "a blood relation." See "Kin," 2 Words & Phrases, p. 1306. Warvelle, Real Property (3d ed.), § 168. The phrase, "Whether of the half or the whole blood," used in § 2455, indicates quite clearly that the section refers only to kindred of the blood and not kindred by affinity. We are of the opinion, therefore, that this section does not apply.

Rem. & Bal. Code, § 7151, is as follows:

"Marriages in the following cases are prohibited:—

"(1) When either party thereto has a wife or husband living at the time of such marriage;

"(2) When the parties thereto are nearer of kin to each other than second cousins, whether of the whole or half-blood, computing by the rules of the civil law ;

"(3) It shall be unlawful for any man to marry his father's sister, mother's sister, father's widow, wife's mother, daughter, wife's daughter, son's widow, sister, son's daughter, daughter's daughter, son's son's widow, daughter's son's widow, brother's daughter, or sister's daughter; it shall be unlawful for any woman to marry her father's brother, mother's brother, mother's husband, husband's father, son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, brother's son, or sister's son; and if any persons being within the degrees of consanguinity or affinity in which marriages are prohibited by this section carnally know each other, they shall be deemed guilty of incest, and shall be punished by imprisonment in the state penitentiary for a term not exceeding ten years and not less than one year."

The appellant argues that the latter part of this section, which defines incest, was repealed by the act of 1909, and that § 2455, above quoted, is the only statute now in force defining the crime of incest. We think this position must be sustained. The legislature of 1909 passed an act relating to crimes and punishments. This act purports to be an act covering the whole field of criminal statutes. Section 203 of that act, found at page 950 of the laws of 1909, is § 2455 of Rem. & Bal. Code, first above quoted. This is the only statute in that code defining incest. Prior to the passage of the act of 1909 relating to crimes and punishments, § 7151, above quoted, was in force, and also §§ 2891 and 2892. Section 2891, then in force, was as follows:

"Incest is the sexual commerce of persons related within the degrees wherein marriage is prohibited."

And § 2892:

"Persons being within the degrees of consanguinity or affinity, within which marriages are prohibited by law, who intermarry with each other, or who commit fornication or adultery with each other, or who carnally know each other,

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shall be deemed guilty of the crime of incest, and upon conviction thereof shall be punished by imprisonment in the state prison for any term not exceeding twenty years."

These two last named sections were expressly repealed by § 52, p. 906, of the act of 1909, being § 2304, Rem. & Bal. Code. It is apparent, therefore, that unless the portion of § 7151 defining incest is continued in force and has not been repealed by the act of 1909, the only section defining incest now in force is § 2455, first above quoted. Sections 48 and 49 of the act of 1909, being §§ 2300 and 2301 of Rem. & Bal. Code, provide as follows:

"§ 2300. The provisions of this act, in so far as they are substantially the same as existing statutes, shall be construed as continuations thereof and not as new enactments.

"§ 2301. No statute, law or rule is continued in force because it is consistent with the provisions of this act on the same subject; but in all cases provided for by this act, all statutes, laws and rules heretofore in force in this state, whether consistent or not with the provisions of this act, unless expressly continued in force by it, are repealed and abrogated."

These two sections are apparently somewhat inconsistent. But the legislature evidently meant thereby to say that new statutes substantially the same as old statutes should be construed as continuations of the old statutes. And in the next section it is provided that, in all cases provided for by this act, all statutes heretofore in force in this state, unless expressly continued in force, are repealed. Section 7151 was not expressly continued in force. Section 2455, defining incest, is only a part of § 7151. Section 7151, prior to the enactment of 1909, defined incest within the degrees of consanguinity and affinity in which marriages were prohibited. Section 2455 defined incest as being when the parties were nearer of kin to each other than second cousins, whether of the whole or the half blood. It seems conclusive, therefore, that when the legislature, by the act of 1909, repealed the sections of the code theretofore in force defining

incest as the sexual commerce of persons related within the degrees wherein marriage is prohibited, it clearly intended to repeal that portion of § 7151 defining incest. We think this follows as a necessary conclusion from the repeal of §§ 2891 and 2892, as stated in § 52 of the act of 1909. If that part of § 7151 defining incest were intended to be continued in force, § 2455 was entirely unnecessary.

We said in *State v. Nakashima*, 62 Wash. 686, 114 Pac. 894, Ann. Cas. 1912 D. 220, that § 7151 was not repealed by § 2455. But in that case we were not considering, and were not called upon to consider, the question presented in this case. That was a case wherein the appellant was charged with incest upon his first cousin under § 2455. The question presented was whether it was necessary to negative the marriage of the appellant with his first cousin, and we held that it was not necessary in the information to negative the marriage relation, and in so far as § 7151 applied to that case, it is plain that it was not repealed. But the part of § 7151 defining incest was, in our opinion, clearly repealed by the enactment of 1909, which is now § 2455, Rem. & Bal. Code, and which later section is the only statute in force defining the crime of incest.

It is contended by the state that the appellant may be prosecuted under the common law. If it was incest at the common law for persons not being related by blood within the degrees named in § 2455 to have sexual intercourse together, we are satisfied that this section was intended to define the crime of incest to the exclusion of the common law.

We are of the opinion, therefore, that the information in this case does not charge the crime, and the judgment is therefore reversed.

MORRIS, C. J., HOLCOMB, CHADWICK, and PARKER, JJ., concur.

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Opinion Per CROW, J.

[No. 12230. Department Two. August 4, 1915.]

THOMAS WILSON *et al.*, *Appellants*, v. WILLIAM CRAIG *et al.*,
Respondents.¹

WILLS—TESTAMENTARY CAPACITY—EVIDENCE—SUFFICIENCY. Testamentary capacity to make a will, excluding various relatives,* by one who had suffered a stroke of paralysis the day before and was partially disabled, is shown by the evidence of his lawyer and a banker, his intimate friend, who were the only persons present, to the effect that he had complete testamentary capacity, knew his property, his relatives and heirs at law, and the disposition he desired made of his estate.

WILLS—EXECUTION—"SIGNED"—STATUTES—CONSTRUCTION. A testator, by making his mark after another has written his name at his request, "signs" the will, within the meaning of Rem. & Bal. Code, § 1320, requiring a will to be signed by the testator; and in such case, there is no room for the application of § 1321, providing that any person who shall sign the testator's name to a will shall subscribe his own name as a witness and state that he subscribed the testator's name at his request.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered April 11, 1914, upon findings in favor of the defendants, dismissing a will contest, tried to the court. Affirmed.

Jas. J. Anderson and *Wesley Lloyd*, for appellants.

Burdick & McQuesten, for respondents.

Crow, J.—On August 20, 1913, John Wilson, a bachelor sixty-seven years of age, died in Pierce county. On August 23, 1913, an instrument purporting to be his last will and testament was admitted to probate by the superior court, and Anna Craig was duly appointed and qualified as executrix. By the terms of this will, the testator devised and bequeathed one-fourth of his estate to each of the following persons: William Craig, Anna Craig his wife, Joe McKnight and Maggie McKnight. The record shows, that all of these

¹Reported in 150 Pac. 1179.

legatees except Anna Craig were heirs at law of the decedent, William Craig and Joe McKnight being nephews, and Maggie McKnight being his niece; that he left other heirs at law for whom he made no provision, as follows: Thomas Wilson, a brother, Eliza Watts and Jane Hilton, sisters, Thomas Craig, Samuel Craig, and John Radcliff, nephews, who, upon January 7, 1914, by petition, commenced this action to set aside the will and vacate the order of probate. The grounds upon which they seek to set aside the will are, (1) want of testamentary capacity, and (2) that the alleged will was not executed in the manner required by law.

The trial court found, that the will had been duly admitted to probate; that at the time of its execution, the decedent was partially disabled by a stroke of paralysis, received on August 17, 1913, the previous day; that his right side, arm, and leg were so paralyzed as to deprive him of their use; that his power of speech was so affected as to cause him to speak with difficulty, although he could speak with sufficient distinctness to be heard and understood by those around him; that the will was written by one G. Dowe McQuesten, an attorney, who read it to the testator; that the testator requested Mr. McQuesten to write the testator's name to the will, which he did, writing the name "John Wilson" and the words "his mark;" that the testator thereupon made his mark as the same appears on the will; that the witnesses to the will thereupon, at the request of the testator, in the testator's presence and in the presence of each other, signed their names as witnesses; that Mr. McQuesten did not state in his certificate as such witness that he wrote the name of the testator at the testator's request; that on August 18, 1913, the day on which the will was executed, John Wilson was of sufficiently sound mind and memory to comprehend and understand the nature and effect of his acts in making the will and to dictate the terms thereof; that he was competent to make distribution of his estate, and that he was not acting under duress or undue influence of any person whomsoever. Upon

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these findings, a decree was entered sustaining the will and dismissing the petition. The contestants have appealed.

Appellants' first contention is that the decedent did not have testamentary capacity. On this question we have carefully examined the evidence and conclude that, by a clear preponderance, it sustains the findings of the trial judge. The only persons present with the testator, at the time the will was drawn and executed, were Mr. McQuesten, decedent's attorney, and J. W. Burgan, cashier of a Tacoma bank, a particular friend of the testator. They signed the will as witnesses, and their testimony clearly shows, that the decedent had complete testamentary capacity; that he knew his property, knew his relatives and heirs at law, knew what disposition he desired to make of his estate, and informed Mr. McQuesten of his wishes in that regard. The will was signed and executed in the following form:

"In witness whereof, I have hereunto set my hand and seal this 18th day of August, A. D. 1913.

his
"John + Wilson
mark

"The foregoing was signed, sealed, published and declared by the above named testator, John Wilson, as and for his last will and testament in the presence of us who at his request and in his presence and in the presence of each other, have subscribed our names as attesting witnesses thereto this 18th day of August, A. D. 1913.

"G. Dowe McQuesten,
"Residing at Tacoma, Washington.
"J. W. Burgan,
"Residing at Tacoma, Washington."

The evidence shows that, after the will was drawn and had been read to the testator by Mr. McQuesten, the testator said he could not write as his right arm was "no good;" that he requested Mr. McQuesten to write his name, which he did; that the testator then took the pen in his left hand and made his mark on the will and that Mr. McQuesten and Mr. Bur-

gan, in his presence and in the presence of each other, witnessed it.

Section 1820, Rem. & Bal. Code, provides:

"Every will shall be in writing, signed by the testator or testatrix, or by some other person under his or her direction in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator."

Section 1821 provides:

"Every person who shall sign the testator's or testatrix's name to any will by his or her direction shall subscribe his own name as a witness to such will, and state that he subscribed the testator's name at his request."

Appellants' second contention is that, as Mr. McQuesten signed the testator's name to the will at the testator's direction, he should not only have subscribed his name as a witness, but should have stated that he subscribed the testator's name at his request; that he failed to do so; that by reason of such omission, the will was not executed in the manner provided by law; that all formalities required by the statute are mandatory and must be strictly construed, and that the will, for want of such strict compliance, is void. In support of this contention, appellants cite the following cases from Missouri, decided under a statute substantially identical with Rem. & Bal. Code, § 1821, *supra*: *McGee v. Porter*, 14 Mo. 612, 55 Am. Dec. 229; *St. Louis Hospital Ass'n v. Williams*, 19 Mo. 609; *Northcutt v. Northcutt*, 20 Mo. 266; *St. Louis Hospital Ass'n v. Wegman*, 21 Mo. 17; *Simpson v. Simpson*, 27 Mo. 288; *Catlett v. Catlett*, 55 Mo. 330.

There is no question but that these cases, predicated on a similar statute, sustain appellants' position. For reasons hereinafter stated, we cannot yield our assent to the rule therein announced, being convinced that it is not well founded in reason and is contrary to elementary principles. It will be noticed that, in the earliest case, *McGee v. Porter*, upon which all the others are directly or indirectly based, the

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name of the testator was signed by his wife at his request, and that, although witnesses testified she then carried it to him and he dotted over his name, the court says: "The record shows nothing more than a mere subscription of the name, no mark, no dot; the testator's name is written as if he had written it himself." With the will executed in this manner, no mark of any kind being made by the testator, the statute invoked might well be applied and the will held void. In the next case, however, *St. Louis Hospital Ass'n v. Williams, supra*, it appeared that, after the name of the testator had at his request been written by another, he made his mark as in the case now before us, and the Missouri court, following the *McGee* case, held the will void for noncompliance with the statutory requirements. The *McGee* case, followed by the later cases cited, does not sustain or authorize this holding. Appellants also cite *Pool v. Buffum*, 3 Ore. 438, in which a statute similar to Rem. & Bal. Code, § 1821, was construed, and in which the will was executed by the testator in the same manner as the will now before us. The Oregon court, however, while apparently yielding its consent to the doctrine of the Missouri cases, fails to follow them, as it sustains the will, and in the course of its opinion said:

"If making one's mark is a signing within the law, it may be doubted, whether the writing of the name by another at the same time is a *signing* within the meaning of the statute."

In the later case of *Moreland v. Brady*, 8 Ore. 303, 34 Am. Rep. 581, which appellants do not cite, the Oregon court sustained a will executed in the same manner, and said:

"It is claimed by the appellant that the will of Bernard Brady is void, because it appears that he signed it by making his mark, and that some other person signed his name to the same without stating that he signed the testator's name at his request, and as a witness, as required by the statute of Oregon. The manner in which the will was signed by the testator, and attested by the subscribing witnesses, was in substantial compliance with the requirements of the statute

in that respect, as was held by this court in *Pool v. Buffum* (3 Or. 438), to which we refer as decisive of this point."

As above stated, Rem. & Bal. Code, § 1320, provides that a will may be signed by the testator. If in legal contemplation he does so sign when he makes his mark, there is no occasion for complying with the requirements of that portion of § 1321 upon which appellants now rely. Authorities are numerous to the effect that a testator by making his mark meets the requirements of a statute requiring him to sign his will, and that his mark is such a signature. Cases may be found where a mark alone has been held sufficient, where a mark added to the testator's name written by another has been sustained, and where a mark added to the testator's name incorrectly written has also been approved; the courts in each and every instance holding the mark to be the signature of the testator. Jarman, Wills (6th ed.), p. 106, § 79; Greenleaf, Evidence (16th ed.), § 674; *Upchurch v. Upchurch*, 16 B. Mon. (Ky) 102; *Flannery's Will*, 24 Pa. St. 502; *In re Guilfoyle*, 96 Cal. 598, 31 Pac. 553, 22 L. R. A. 370; *In re Mulin's Estate*, 110 Cal. 252, 42 Pac. 645; *Stephens v. Stephens*, 129 Mo. 422, 31 S. W. 792, 50 Am. St. 454; *Rook v. Wilson*, 142 Ind. 24, 41 N. E. 311, 51 Am. St. 163; *Thompson v. Thompson*, 49 Neb. 157, 68 N. W. 372.

In *Upchurch v. Upchurch*, *supra*, the court said:

"A literal adherence to the words of the statute would operate harshly, and exclude all persons unable to write their names, as witnesses, to wills, however worthy of credence. A more liberal construction will as effectually accomplish the ends of the statute, and not violate its language, nor render invalid a paper proved, as we think this is, beyond all reasonable doubt, to be the last will of the testator by the requisite number of witnesses, whose names were subscribed, though by another, in their presence and at their request. In this conclusion, we are supported by direct authority in a case arising under the statutes of Virginia respecting wills, where the same mode of authentication is required. (6th Grattan's Report, 57.)"

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Many other citations might be made in support of the proposition that, by making his mark, a testator himself signs his will. We call attention to an Arkansas case, *In the Matter of the Will of Cornelius*, 14 Ark. 675, which is directly in point and in which the will was signed and executed by the testator in identically the same manner as the will now before us. Section 4 of the Arkansas statute, as stated in the opinion, provides that every will "must be subscribed by the testator at the end of the will, or by some person for him, at his request." The succeeding section 5 reads as follows:

"Every person, who shall sign the testator's name to any will, by his direction, shall write his own name as a witness to such will, and state that he signed the testator's name at his request."

It will be noticed that these sections are substantially the same as Rem. & Bal. Code, §§ 1320, 1321, *supra*. The Cornelius will was assailed in the same manner, and for the same reasons, that appellants now assail the will of John Wilson. The Arkansas court held the will had been signed by the testator, and that it was properly executed. The case is well considered and founded on supporting authorities cited in the opinion. The conclusion of the court is tersely stated in the following words:

"And we think we are giving full effect to the 5th section above quoted, by holding that when the testator's name is signed to a will by his direction, and he does nothing more, thereby adopting such signature as his subscription, in such case the person, so signing for the testator, must also write his own name as a witness, and state that he signed the testator's name at his request, and that it ought not to apply to a case where the testator does himself sign though by making his mark."

The substance of this holding, which we adopt, is that, when the testator signs by making his mark, he signs and executes the will himself, although his name may have been subscribed by another at his request. This conclusion is in line with the authorities above cited, to the effect that a testa-

tor may sign by making his mark. In the later case of *Guthrie v. Price*, 23 Ark. 396, a vigorous attempt was made by counsel to prevail upon the Arkansas court to overrule the *Cornelius* case, but the court, at page 403, said:

"The court, in giving the first and fourth instructions, moved by the petitioners, and in refusing the instruction asked by the defendants, ruled directly contrary to the decision of this court in *In the Matter of the Will of Cornelius*, 14 Ark. 675, where it was held, that where the testator's name was written to the will by another person, and he made his mark, it was a valid subscription within the meaning of the statute. The counsel for the petitioners have asked us to review the opinion in that case, criticizing, with much ingenuity, the words of the statute, to show that the opinion is not well founded. But the decision is supported by adjudications upon statutes similar to ours, and by the standard text books, and we think it should not be disturbed."

Our conclusion, from a consideration of our statutes in the light of the authorities which we have carefully examined, is that we cannot follow the early Missouri cases cited by appellants; that when John Wilson, the testator himself, made his mark, he signed the will in compliance with Rem. & Bal. Code, § 1320, although the witness, at the testator's request, had previously subscribed the testator's name, and that the requirements of § 1321, upon which appellants rely, apply only to a case in which the name of the testator is subscribed by another at the testator's request, and the testator himself does no act, by making his mark or otherwise, for the purpose of signing the will.

The judgment is affirmed.

MORRIS, C. J., FULLERTON, ELLIS, and MAIN, JJ., concur.

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Opinion Per HOLCOMB, J.

[No. 12325. Department One. August 4, 1915.]

JAMES CARKONEN, *as Administrator etc., Appellant*, v.
COLUMBIA & PUGET SOUND RAILROAD COMPANY,
Respondent.¹

JUDGMENT—NOTWITHSTANDING VERDICT—TIME FOR MOTION. A motion for judgment notwithstanding the verdict of a jury is not timely when not made until after entry by the clerk of judgment upon the verdict, after which only a motion for a new trial may be entertained.

Appeal from a judgment of the superior court for King county, Humphries, J., entered March 24, 1914, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Reversed.

Brady & Rummens, for appellant.

Farrell, Kane & Stratton and *Stanley J. Padden*, for respondent.

HOLCOMB, J.—Appellant sued as administrator of the estate of John Athanasiades, deceased, on behalf of the surviving wife and children of deceased, to recover damages for the alleged negligent killing of the decedent by the defendant while he was working as a section man on defendant's interstate railroad. The action was brought under the employers' liability act of Congress, 35 U. S. Stats. at Large, 65. The trial before a jury resulted in a verdict for plaintiff in separate sums for the widow and two daughters, which verdict was filed, and the clerk thereupon entered judgment. Within two days thereafter, respondent filed a motion for a judgment *non obstante veredicto*, and a motion for new trial, stating substantially all the statutory grounds. On consideration of said motion for judgment *non obstante veredicto*, the court granted same, and in its order specifically stated

¹Reported in 150 Pac. 1162.

that it did not consider or pass on the motion for a new trial. Judgment was accordingly entered for the defendant notwithstanding the verdict, and plaintiff appealed therefrom.

Appellant first contends that the trial court erred in granting judgment notwithstanding the verdict, for the reason that the clerk had already entered judgment upon the verdict in compliance with Rem. & Bal. Code, § 431 (P. C. 81 § 729). This court has but recently repeatedly passed upon the same question. In *Forsyth v. Dow*, 81 Wash. 137, 142 Pac. 490, the court, per Chadwick, J., held that such motion coming after the entry of judgment upon the verdict is not timely, and that any motion other than a motion for a new trial, made after the entry of judgment on the verdict, should not be granted. This case is controlled by the decisions in the foregoing case, and also by the decision on rehearing *En Banc* of the case of *Paich v. Northern Pac. R. Co.*, ante p. 379, 150 Pac. 814.

For the reasons stated in the foregoing cases, the judgment is reversed, and the cause remanded with instructions to the superior court to consider and determine the motion for new trial made by respondent, and not passed upon by the trial court, and for such further proceedings as may then be proper.

MORRIS, C. J., MOUNT, CHADWICK, and PARKER, JJ., concur.

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Opinion Per MAIN, J.

[No. 12600. Department Two. August 4, 1915.]

GRANT HARPER, *Respondent*, v. PEARL GRASSER *et al.*,
Appellants.¹

APPEAL—DECISIONS REVIEWABLE—CESSATION OF CONTROVERSY. An appeal from a judgment enjoining interference with a fishing license that expired prior to the hearing on appeal will be dismissed; since there is no longer any subject-matter involved upon which a judgment can operate, and the supreme court will not retain jurisdiction to determine the sole question of costs.

FISH—FISHING LOCATION—DAMAGES. Damages for interference with rights under a drag seine fishing license cannot be recovered where drag seine fishing at the location in question was unlawful and would constitute a misdemeanor.

Appeal from a judgment of the superior court for Asotin county, Miller, J., entered October 23, 1914, upon findings in favor of the plaintiff, in an action to enjoin interference with a fishing location, tried to the court. Appeal dismissed.

Geo. W. Tannahill, Fred E. Butler, and M. P. Shaughnessy, for appellants.

Will H. Fouts and E. J. Doyle, for respondent.

MAIN, J.—The plaintiff and the defendant Pearl Grasser were rival claimants to a fishing location on the south side of the Snake river, near the city of Clarkston, Washington. The defendants other than Pearl Grasser claim no rights superior to hers. The defendant Pearl Grasser claims under a drag seine fishing license issued by the state fish commissioner on April 27, 1914. The plaintiff claims under a drag seine fishing license issued by the state fish commissioner on June 1, 1914. After the issuance of the licenses to the respective parties, both parties complied with the requirements of the statute relative to the location of the particular grounds which should be fished under authority of the licenses. The defendants claim that their rights are superior because the

¹Reported in 150 Pac. 1175.

license issued to Pearl Grasser is prior in point of time. The plaintiff claims that, while his license was issued subsequent to that of the defendant Pearl Grasser, yet his rights are superior, because he had occupied the grounds in controversy under a license issued for the previous year, and, at the time his license was issued, his right to a renewal, which would be superior to that of any other claimant, had not expired. The plaintiff sought an injunction restraining the defendants from interfering with his fishing grounds under his license. The defendants sought an injunction for a like purpose against the plaintiff; and also prayed for damages. The cause was tried to the court without a jury. The trial court was of the opinion that the right of the plaintiff to the fishing grounds, which both parties were claiming, was superior to that of the defendants. A judgment was entered restraining the defendants from interfering with the plaintiff's fishing grounds located and held under his license. The defendants appeal.

The respondent opens his brief with a motion to dismiss the appeal. This motion is based upon the claim that neither party had any right to fish the location in question with a drag seine, and that, therefore, there is nothing for the judgment of the court to operate upon. The rule is well settled that, where, pending an appeal, the right involved in the action has ceased to exist and there is no subject-matter upon which the judgment can operate, the appeal will be dismissed. In *Barber Asphalt Pav. Co. v. Hamilton*, 80 Wash. 51, 141 Pac. 199, it is said:

"We have repeatedly held that where, pending an appeal, the controversy between the parties or the right involved in the action has ceased to exist, the appeal will be dismissed upon a showing thereof, either by the record or by evidence produced in this court, upon the ground that there is no subject-matter upon which the judgment could operate."

In support of that rule, numerous decisions of this court are cited which need not here be repeated. Applying the

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rule to the licenses in this case, and assuming for the present that the licenses are not void, it appears that both licenses, not only by their terms, but by statute (Rem. & Bal. Code, § 5211; P. C. 191 § 71), expired on March 31, 1915. The cause was heard in this court on June 28, 1915. It thus appears that any rights either party may have had under the license to fish the grounds in controversy had expired prior to the time the cause was heard here. It follows that there is no longer any subject-matter involved in the controversy upon which a judgment can operate.

But it may be argued that, since the defendants claim damages, the court should retain jurisdiction of the cause and determine whether the defendants' rights were superior and, if so, either award damages, or remand the case to have the damages determined by the trial court. An answer to this position would be that neither party in fact had any right to fish the grounds with a drag seine, the purpose for which the licenses were issued. Under the holding in *State v. Allen*, 80 Wash. 83, 141 Pac. 292, fishing with a drag seine in the Snake river at the point mentioned would be unlawful, and would constitute a misdemeanor. It follows, therefore, that the defendants would be entitled to no damages on account of being prevented from doing the thing which, if done, would be unlawful.

As we view the case, the only controversy remaining between the parties is one of costs. This court will not entertain jurisdiction of an appeal for the sole purpose of determining the question of costs. *Smith v. Palmer*, 38 Wash. 276, 80 Pac. 460; *Wilson v. Fraser*, 67 Wash. 347, 121 Pac. 829. It thus becomes apparent that the motion to dismiss the appeal must be granted, and it is so ordered.

Appeal dismissed.

MORRIS, C. J., ELLIS, FULLERTON, and CROW, JJ., concur.

[No. 12604. Department One. August 4, 1915.]

WESTERN DRY GOODS COMPANY, *Appellant*, v.

M. L. HAMILTON *et al.*, *Respondents*.¹

TRIAL—FINDINGS OF FACT—NECESSITY. In an action at law in which issues of fact are tried out on the merits before the court without a jury, findings of fact are necessary to support the judgment; under Rem. & Bal. Code, § 367, providing that, upon the trial of an issue of fact by the court, its decision shall be given in writing, with the facts found and the conclusions of law separately stated.

SAME—FINDINGS OF FACT—WAIVER. Findings of fact, necessary to support a judgment in an action at law tried to the court on the merits, are not waived by appellant's failure to request such findings as the court is willing to make, after having denied plaintiff's requested findings.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered October 22, 1914, in favor of the defendant, in an action on contract, tried to the court. Reversed.

Nelson R. Anderson, for appellant.

Karr & Gregory and *Bruce N. Martin*, for respondent Hamilton.

CHADWICK, J.—This is an action at law, tried by the court without a jury. Lester E. Hamilton defaulted. Counsel for appellant prepared findings of fact and conclusions of law consistent with his theory of the case and presented them to the court. The court refused to sign these findings and entered a judgment in favor of respondent M. L. Hamilton, without having made findings of fact or conclusions of law.

We are met at the threshold of the case by an assignment of error which again brings us to a consideration of Rem. & Bal. Code, § 367:

"Upon the trial of an issue of fact by the court its decision shall be given in writing and filed with the clerk. In

¹Reported in 150 Pac. 1171.

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giving the decision the facts found and the conclusions of law shall be separately stated. Judgment upon the decision shall be entered accordingly."

This court has held that, unless there are findings by the court or a verdict of a jury, there is nothing to support the judgment. *Kilroy v. Mitchell*, 2 Wash. 407, 26 Pac. 865; *Bard v. Kleeb*, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273. And further, that this section of the statute is mandatory. *Wilson v. Aberdeen*, 25 Wash. 614, 66 Pac. 95. These cases are adhered to and followed in the case of *Colvin v. Clark*, 83 Wash. 376, 145 Pac. 419.

Counsel for respondent assert, however, that the case should not be reversed because of the omission of the court, for the reason that appellant is not in position to avail himself of the statute or the rule of the cases cited, in that he did not request findings that the court was willing to sign. *Slayton v. Felt*, 40 Wash. 1, 82 Pac. 173. Under a similar record, the court said in that case:

"It is true that appellant did request the trial court to make findings of fact in favor of himself, upon the issues raised by the pleadings, the same being claimed by him to be warranted by the evidence admitted. The court, not thinking the evidence warranted such findings, refused to sign the same. It does not appear, however, that appellant at any time requested the court to make such findings of fact and conclusions of law as it might determine to be proper or warranted by the evidence. We think this request should have been made, before appellant would be entitled to base a successful assignment of error upon the refusal of the court to make any findings whatever. . . . In view of this fact, and, also, the further fact that appellant failed to request the court to make findings in accordance with its view of the evidence, we think no error prejudicial to appellant has been committed. In an action at law, either party has the right to request a trial court to make such findings of fact as it may deem proper, upon all the issues involved, or upon any particular issue, which such party may deem material or important, and such findings should then be made. A mere request, however, to make certain findings in favor of such

party only, is not in itself sufficient. Of course, it is the proper and correct practice for a party to request findings in his own favor, to which he may think himself entitled, so that he may make proper exceptions to their refusal. But such findings in his favor having been refused and excepted to, he must, if he desires to assign error on a failure to make any findings or conclusions whatever, also request the court to make such findings as it thinks the evidence warrants. This was not done by appellant in this action."

Three of the judges signing the opinion did so upon the theory that no findings are necessary where no affirmative relief is granted. They concurred in the result of the court's consideration of the case and not in the reasoning of the writer of the opinion and the judges who followed him.

After further consideration of the statute and all of our decisions and a free discussion of the issue now presented, a majority of the court as now constituted are of opinion that the reasoning of the court in the case cited is not consistent with the statute and does violence to the decisions of this court that are cited in the opinion. The statute had already been held to be mandatory, and a judgment entered without findings to be voidable upon direct attack as having nothing to support it. The holding in the *Slayton* case, notwithstanding the former declarations of the court, is that the statute is not mandatory, *unless* counsel request findings covering his own theory of the case, and these being refused, he prepare and submit findings covering the theory of the prevailing party or of the court.

The statute puts no such burden upon a defeated litigant, nor does it, by its terms, warrant an implication of any exception to its mandatory features. A losing party has done all that the law requires of him when he has given the trial judge an opportunity to sign the findings and conclusions he believes should be made and found. If the opposing party is willing to take a judgment with no findings to support it, he does so at his peril. The reasons why find-

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ings should be prepared and signed are obvious and have frequently been adverted to by this court.

"As we regard it, § 246 is for the protection of court and parties. To the court it gives an opportunity to place upon record its view of the facts and the law in definite written form, sufficiently at large that there may be no mistake. To parties it furnishes the means of having their causes reviewed, in many instances without great expense." *Bard v. Kleeb*, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273.

It is that a party "may bring up such matters without the trouble and expense of procuring a statement of facts or bill of exceptions." *Carstens & Earles v. Hine*, 39 Wash. 498, 81 Pac. 1004. The statute is sustained by a consideration equally as important: that is, that the facts may be readily understood by this court and that we may know the questions upon which the parties do not agree. Although the rule is that findings of fact and conclusions of law are unnecessary in equity cases, it is a matter of frequent trouble and embarrassment for us to gather from the whole record in such cases the theory and conclusions of the trial judge upon particular or collateral questions that arise in every case and frequently have an important bearing upon the general result. In the case at bar, the theory of the trial court is not entirely clear to us, nor is it made clear by the briefs of counsel. There are several grounds upon which his judgment may have been rested, and we think that it is asking no less than we are entitled to to have the benefit of his judgment upon the facts as well as upon the law.

Neither do we agree with the proposition that "findings are not necessary where no affirmative relief is granted." It may be admitted that no findings are necessary where a judgment of dismissal is entered. This court has frequently so held. But a judgment entered after a trial upon facts found, or for want of facts, is not a judgment of dismissal. It is a judgment upon the merits. As, for instance, a judgment of dismissal because the complaint does not state a

cause of action, and a refusal to plead over, would require no findings of fact, for the evident reason that there has been no inquiry into the facts. It is otherwise where testimony is taken and a judgment entered upon an issue of fact. A judgment in which no affirmative relief is granted cannot be made the equivalent of a judgment of dismissal. The one follows a want of sustaining law, the other a want of sustaining fact. Suppose a party brought an action upon a note outlawed upon its face, and plead that the defendant had been out of the state for a time sufficient to toll the statute, and upon issue joined, the court should hold that the defendant had been within the jurisdiction of the court at all times and enter a judgment, without findings of fact, that plaintiff take nothing and that defendant go without day, having his costs, could it be contended that the statute might be ignored because no "affirmative relief is granted," or that it is a "judgment of dismissal?" To so hold would be to say that findings should be entered when the plaintiff prevails, but are unnecessary when the defendant prevails, unless the defendant take affirmative relief. It might be good practice, but the answer to the suggestion is that the statute neither expresses nor implies any exceptions, modifications, or interpretations that will admit of it.

This case depends upon facts which the court found in favor of respondent. The judgment being upon the merits and having no finding of facts to support it, the case is reversed and remanded with directions to follow the procedure suggested in the case of *Colvin v. Clark, supra*.

Reversed and remanded.

MORRIS, C. J., MOUNT, HOLCOMB, and PARKER, JJ., concur.

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[No. 12645. Department Two. August 4, 1915.]

NATIONAL LUMBER & MANUFACTURING COMPANY, *Appellant*,
v. CHEHALIS COUNTY *et al.*, *Respondents*.¹

TAXATION—ASSESSMENT—VALUATION—"MARKET" VALUE. Rem. & Bal. Code, § 9112, providing that property be assessed for taxation at its true and fair value, defined to be what it is fairly worth in money and that value at which the property would be taken in payment of a just debt from a solvent debtor, requires its assessment at its market value.

SAME—ASSESSMENT—VALUATION—"MARKET" VALUE — EVIDENCE — SUFFICIENCY. An assessment of the personal property of a sawmill company is not invalid as not based upon its "market" value, because the assessor and board of equalization adopted the "depreciated" value as determined by an appraisal company upon consideration of its present condition, replacement value, and present utility, although owners testified that the market value, as shown by sales, was much less than the depreciated value, where there was evidence that the depreciated value furnishes a basis upon which banks extend credit and insurance companies pay losses and was what it was worth to the owner and substantially the same as its market value, and there was no clear evidence to overcome the conclusions of the board of equalization, acting in a quasi judicial capacity, such as a showing that the practical utility of the mill had been affected by exhaustion of the timber supply, or the like.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered February 4, 1915, upon findings in favor of the defendants, dismissing an action to secure the reduction of a tax, tried to the court. Affirmed.

Hogan & Graham and *Bridges & Bruener*, for appellant.

J. E. Stewart, *Wm. E. Campbell*, and *A. Emerson Cross*, for respondents.

MAIN, J.—The plaintiff brought this action for the purpose of securing a reduction of the amount of a tax levied upon certain personal property owned by it, and restraining the county and its officers from collecting more than the

¹Reported in 150 Pac. 1164.

amount which had been tendered in full payment. This is one of nine cases brought for the same purpose. The other eight were prosecuted by different mill owners. After a trial upon the merits, the action was dismissed. From this judgment, the plaintiff appeals.

The facts are substantially as follows: The appellant, during the year 1913, and for some years prior thereto, was the owner of a sawmill plant located at Hoquiam, Washington, in Chehalis (now Grays Harbor) county. Prior to the year 1913, the appellant had an appraisal made of its plant by the General Appraisal Company of Seattle. This company is engaged in the business of appraising sawmills and other manufacturing plants, and has had an extensive experience in such work. In appraising the machinery of a sawmill plant, the General Appraisal Company finds the new replacement value, the depreciated value, and the insurable value; the depreciated value and the insurable value being the same, except in the insurable value there is not included those items of personal property which are not subject to be destroyed by fire, and, consequently, are not covered by insurance. In determining the depreciated value, the General Appraisal Company takes into consideration the condition of a particular article, the length of time it has been used, and whether or not it has become obsolescent, that is, whether the machine is useful or not, or whether it has been replaced by later inventions and more modern machinery. These appraisements made by the General Appraisal Company are admitted by both parties to the litigation to be correct and reliable.

The assessor, in making the assessment for the year 1913, did not have before him the appraisal. He sought to reach the same result by referring to an insurance policy which had expired a year or more previously. The assessor found the depreciated value of the machinery in the appellant's mill to be \$265,200, and the assessable value to be \$106,080. The assessable value was arrived at by taking forty per cent of

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the depreciated value. Property throughout the county for the year mentioned was assessed at forty per cent of its true, actual, or market value.

During the year 1914, and before this cause was tried in the superior court, the county had employed the General Appraisal Company to appraise, for the purpose of taxation, all of the sawmills in the county. In this appraisal, the depreciated value of each mill was ascertained as of March 1, 1914. It is conceded that the value of the machinery in the appellant's plant was substantially the same on March 1, 1913, as it was on March 1, 1914. During the year 1914, a number of the mill companies employed the General Appraisal Company to ascertain the market value of their respective plants, claiming that the market value and the depreciated value were not the same.

The appellant, not being satisfied with its assessment for the year 1913, contested the same before the equalization board. This board reduced the assessable value from the amount above mentioned, to \$76,500. This is a trifle less than forty per cent of the depreciated value of the machinery as found for the year 1914 by the General Appraisal Company; but, as above indicated, it was admitted that the depreciated value was the same in 1914 as the year previous. The assessed value, as fixed by the board for the year 1913, was a little less than forty per cent of the depreciated value of the machinery. The assessor believed the depreciated value to be the true or market value. The board of equalization entertained the same view. The reduction was made by the board because the means adopted by the assessor for determining the depreciated value had resulted in fixing a value greater than that sum. The use of the old insurance policy for the purpose of determining the depreciated value was responsible for the erroneous result arrived at by the assessor.

The appellant claims that the depreciated value of the machinery is not the same as the true or market value, and

that therefore its property is grossly overassessed. The respondent claims that the depreciated value is the true or market value. The question, then, here for determination is whether the depreciated value of the machinery, as found by the General Appraisal Company, is the same as the true or market value.

The statute, Rem. & Bal. Code, § 9112, is as follows:

"All property shall be assessed at its true and fair value in money. In determining the true and fair value of real or personal property, the assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation; nor shall he adopt as a criterion of value the price for which the said property would sell at auction, or at a forced sale, or in the aggregate with all the property in the town or district; but he shall value each article or description of property by itself, and at such sum or price as he believes the same to be fairly worth in money at the time such assessment is made. The true cash value of property shall be that value at which the property would be taken in payment of a just debt from a solvent debtor. . . ."

This statute requires that all property shall be assessed at its true and fair value in money. The true and fair value in money, as provided in the statute, is to be determined by "that value at which the property would be taken in payment of a just debt from a solvent debtor." Construing this statute in *Spokane & I. E. R. Co. v. Spokane County*, 75 Wash. 72, 134 Pac. 688, it was held that the measure of value mentioned in the statute when "reduced to its simplest terms, is 'market value.'" If, then, the depreciated value is not the same as the market value, the value of the appellant's property for purposes of assessment was measured by an arbitrary and erroneous standard. The inquiry must, therefore be directed to the determination of the question whether the depreciated value and the true or market value are in substance the same.

The president of the General Appraisal Company testified that the depreciated value, as fixed by his company, was the

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basis which banks used in extending credit to mill companies, and insurance companies used in the adjustment and settlement of fire losses, and that it was what the property was worth to the owner. The manager of the appellant company, as well as the manager of one of the other companies which is contesting the assessment, testified that the true or market value of the machinery in the appellant's plant was very much less than the depreciated value, as fixed by the General Appraisal Company. The president of the General Appraisal Company also testified that the market value was not the same as the depreciated value, as the market value is "wrapped up in business affairs that it is not necessary to go into in any way for depreciated value." He also testified that the sales of mill properties would furnish a guide to the market value, and instanced a number of sales. The facts attendant upon the sales which were referred to, we think do not show that those sales were made at a price at which the property would be taken in payment of a just debt from a solvent debtor.

If the depreciated value furnishes a basis upon which banks extend credit, and insurance companies pay losses, and is what the property is worth to the owner, it is difficult to see why this is not the market value of the property and the value at which the property would be taken in payment of a "just debt from a solvent debtor." It is a well known fact that officers of banks when extending credit do not swell the value of property upon which credit is extended; and that insurance companies in settling fire losses do not pay more than the value of the property lost. The fact that the assessor started out to find the depreciated value, which he regarded as the true value, instead of taking the mandate of the statute requiring the determination of the true value, and using the depreciated value, together with all other relevant facts as evidence in determining the true value as fixed by the statute, would not necessarily make the assessment void if the amount of the assessment, even though arrived at

by erroneous methods, was the statutory value. Some forty-six mills were assessed for the year 1913 in the same manner. Of these, nine or ten have contested the assessment. While the fact that the other thirty-six have not complained of their assessment is not evidence that the depreciated value of the appellant's plant is its market value, it yet may be referred to as showing that the standard used was not generally, by mill owners, regarded as incorrect or unjust. The board of equalization was of the opinion, as already stated, that the depreciated value corresponded to the market value. The trial court entertained the same view after a consideration of the evidence. After reading carefully the appellant's abstract of the evidence, and the respondent's supplemental abstract, and a large part of the testimony as it appears in the statement of facts, we are of the opinion that the conclusion of the board of equalization, and the judgment of the trial court, are not overcome by the testimony in the record. The board of equalization acts in a quasi judicial capacity in making or equalizing assessments, and the evidence to overthrow its conclusions must be clear. *Templeton v. Pierce County*, 25 Wash. 377, 65 Pac. 553. Finding the new replacement value, and then deducting from this the amount of the depreciation, is one way of finding the actual value. The new replacement value, less the depreciation, would give the depreciated value. *San Joaquin etc. Irrigation Co. v. Stanislaus County*, 191 Fed. 875; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1.

These cases, it is true, are not tax cases. But if the depreciated value is the measure of the actual value of the plants under consideration in those cases, there does not appear to be any reason why it should not be the measure of the actual or market value in the present case. We do not want to be understood as holding that the depreciated value is a universal standard of actual or market value. We only hold that, under the facts in the present case, the two standards are substantially coordinate. If it had been shown by

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the testimony that the timber tributary to the appellant's sawmill had all been exhausted, and that it would be necessary to remove the mill to some more advantageous location before it would be of practical utility, an entirely different question would be presented. Whitten, *Valuation of Public Service Corporations*, p. 43. The evidence in this case, however, does not show, or tend to show, that the timber tributary to the appellant's mill is either now, or likely to be exhausted in the near future.

The other eight cases above mentioned were argued in this court at the same time that the present case was argued, the same counsel appearing in all the cases. They are all determined by the holding in this case, and in deciding them, simply a reference will be made to this opinion.

The judgment will be affirmed.

MORRIS, C. J., ELLIS, FULLERTON, and CROW, JJ., concur.

[No. 12709. Department One. August 4, 1915.]

SPOKANE MERCHANTS ASSOCIATION, *Appellant*, v. PACIFIC SURETY COMPANY, *Respondent*.¹

BONDS—INDEMNITY—ACTIONS—PARTIES ENTITLED TO SUE—CREDITORS—PRIVITY. The creditors of a subcontractor on state work cannot maintain an action upon his bond, not required by any statute, but given to the principal contractor to secure performance of the subcontract, since there is no privity between the parties to the action; even though such bond was conditioned, in part, in the language of Rem. & Bal. Code, § 1159, following the language of the principal contractor's bond to the state given to secure persons furnishing supplies and performing labor on public work; especially in view of that part of § 1159 providing that the original contractor's bond shall protect persons furnishing labor or supplies to any subcontractor on the work.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered September 1, 1914, upon

¹Reported in 150 Pac. 1054.

findings in favor of the defendant, in an action upon an indemnity bond, tried to the court. Affirmed.

J. B. Campbell and *J. D. Campbell*, for appellant.

Charles E. Swan, for respondent.

PARKER, J.—This is an action upon a bond executed by Nick Mandic, as principal, and Pacific Surety Company, as surety, to secure performance by him of work upon state aid road No. 71, with Ilse & Elliott, who had the principal contract with the state for the construction thereof. Trial before the court without a jury resulted in findings and judgment in favor of the defendant, from which the plaintiff has appealed.

In June, 1910, Ilse & Elliott entered into a contract with the state of Washington for the construction by them of state aid road No. 71. At the same time, in compliance with the provisions of Rem. & Bal. Code, § 1159 (P. C. 309 §93), they executed a bond to the state of Washington, with a surety company as surety, conditioned that they,

“shall pay all laborers, mechanics, sub-contractors, and material men and all persons who shall supply such laborers, mechanics or subcontractors with materials, supplies or provisions for carrying on such work, and all just debts, dues and demands incurred in the performance of such work”.

These are conditions of bonds as required by that section. Thereafter, on August 24, 1910, Nick Mandic entered into a subcontract with Ilse & Elliott for the doing of work upon the road. Thereafter, on September 10, 1910, Nick Mandic executed to Ilse & Elliott a bond with respondent, Pacific Surety Company, as surety, in pursuance of his subcontract, conditioned in part substantially as the above quoted conditions in the bond given to the state of Washington by Ilse & Elliott, the original contractors. Thereafter Nick Mandic incurred indebtedness in the performance of his subcontract for supplies furnished him by several persons, who thereafter assigned their claims to appellant, Spokane Merchants As-

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sociation. It thereupon commenced this action to recover such indebtedness from the Pacific Surety Company upon the bond executed by it, as surety, and by Nick Mandic, as principal, to Ilse & Elliott.

The trial court disposed of the case in favor of respondent, upon the theory that there was no privity of contract between it and the persons who furnished Nick Mandic with supplies for the prosecution of his subcontract. This disposition of the case is in harmony with our former decisions in *Sears v. Williams*, 9 Wash. 428, 37 Pac. 665, 38 Pac. 135, 39 Pac. 280, and *Armour & Co. v. Western Construction Co.*, 36 Wash. 529, 78 Pac. 1106. It seems quite plain to us that the bond here sued upon was given only for the benefit of Ilse & Elliott. The purpose of having it conditioned in part in the language of the statute, as was the bond given by Ilse & Elliott to the state, manifestly was to secure them against debts incurred by Nick Mandic in the performance of his subcontract, since they were liable under their bond to the state for such debts incurred by Nick Mandic, as well as for debts incurred by themselves in the prosecution of their contract with the state. This is rendered plain by the following language of Rem. & Bal. Code, § 1159:

“ . . . any person or persons performing such services or furnishing material to any subcontractor shall have the same right under the provision of such bond as if such work, services or material was furnished to the original contractor.”

Appellant's assignors were secured, if at all, by the bond given by Ilse & Elliott to the state in pursuance of Rem. & Bal. Code, § 1159. The bond here sued upon was not given in pursuance of any statute. As a common law bond, it will not bear the construction that it was given to secure any one but Ilse & Elliott.

The judgment is affirmed.

MORRIS, C. J., MOUNT, HOLCOMB, and CHADWICK, JJ.,
concur.

[No. 12735. Department Two. August 4, 1915.]

THE STATE OF WASHINGTON, *on the Relation of Scott Calhoun et al., Plaintiff, v. THE SUPERIOR COURT FOR KING COUNTY, Respondent.*¹

JUDGES—POWERS—EXERCISE BEYOND TERRITORIAL LIMITS—VISITING JUDGES. Rem. & Bal. Code, § 42, expressly authorizes a judge of one county who sits in a case in any other county out of the district to determine the cause and render judgment in any other county in the state.

JUDGMENTS—TIME FOR RENDITION—DELAY. Delay in moving for judgment after the court has announced its conclusions does not work a loss of jurisdiction, the adverse parties having remained silent.

PROHIBITION—TO COURTS—WHEN LIES—JURISDICTION. Since prohibition does not lie to arrest the erroneous exercise of acknowledged jurisdiction, the remedy being by appeal, it will not issue to a judge who has been given jurisdiction to enter a judgment to restrain him from erroneously determining an issue which it was not intended to submit to him.

JUDGES—JURISDICTION—VISITING JUDGES—LOSS OF JURISDICTION. In a receivership proceeding, in which issues had been referred to a visiting judge for trial, subsequent proceedings and orders in the receivership by the regular judge, such as acting on claims, does not deprive the visiting judge of the power to act upon the matters submitted to him.

Application filed in the supreme court April 2, 1915, for a writ of prohibition to the superior court for King county, Kauffman, J., to prohibit further proceedings in a cause. Writ denied.

Scott Calhoun, for relators.

Higgins & Hughes, for respondent.

FULLERTON, J.—On May 1, 1908, the Seattle, Renton & Southern Railway Company owned and operated a street and suburban railway between a certain point in the city of Seattle and the city of Renton, all in King county. On the

¹Reported in 150 Pac. 1168.

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day named, it made a trust deed of all of its property to Augustus S. Peabody and the First Trust and Savings Bank of Chicago, to secure the payment of one million dollars in bonds which it proposed to issue and which the brokerage firm of Peabody, Houghteling & Company agreed, upon certain conditions, to float. The bonds were subsequently issued in part, and were floated pursuant to the agreement, and became outstanding obligations of the company to the amount of some \$850,000. The railway company continued thereafter as a going concern, under the management of trustees elected by its stockholders, until May 1, 1911, when, again finding itself unable to meet its obligations, it entered into another agreement with the firm of Peabody, Houghteling & Company. Under the terms of this latter agreement, the stockholders of the railway company conveyed to the trustees named in the original agreement all of the capital stock of the railway company except five shares, as security for the issuance by the railway company of some \$300,000 "collateral trust notes," which the firm of Peabody, Houghteling & Company agreed to purchase. The agreement further provided for the resignation of three of the then five trustees, and for the filling of their places by persons selected by Peabody, Houghteling & Company, giving to that company the management and control of the railway company's business. Prior to this sale in pledge, one William R. Crawford was the principal stockholder of the railway company's stock, owning some 250,000 of the 300,000 into which the capital stock was divided.

On April 30, 1912, Crawford brought an action against the trustees named in the trust deed and collateral trust agreement, making the railway corporation and the firm of Peabody, Houghteling & Company parties thereto, alleging mismanagement of the railway company's business on the part of the trustees selected by Peabody, Houghteling & Company, and that the railway company was in imminent danger of insolvency because of a conspiracy existing between

the trustees named in the trust agreements and the firm of Peabody, Houghteling & Company to precipitate that event; one ground of the contention being that the trustees were about to suffer certain maturing obligations of the railway company to default, although sufficient funds were in the treasury of the company to meet them. He asked for the appointment of a receiver *pendente lite*, that the purposes of defendants might not be accomplished. The defendants in the action appeared, made answer to the allegation of the complaint, and successfully resisted the appointment of the temporary receiver. Subsequently the railway company made default in its maturing obligations, whereupon the trustees in the trust agreements began an action in the Federal court against the railway company, alleging its insolvency, its default in the payment of its matured obligations, and asking for the appointment of receivers. The railway company appeared in the action and admitted its insolvency, and receivers were appointed, who took possession of the railway property and proceeded with its operation.

After the confession of insolvency made by the railway company in the suit in the Federal court, Crawford filed a supplemental complaint in the state court, alleging the insolvency of the corporation, and procured from that court the appointment of permanent receivers for the railway company. A showing was made in the Federal court of this appointment, whereupon that court set aside its original order for want of jurisdiction, and directed its receivers to turn the railway property over to the receivers appointed by the state court. While in possession of the railway property, the receivers appointed by the Federal court received large sums of money as the earnings of the road and expended large sums in its operation. The receivers, pursuant to the order of the Federal court to turn over to the receivers of the state court the property of the railway company, tendered to such receivers the difference between these two sums. The receivers of the state court conceived that the Federal re-

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ceivers should not be allowed the deductions made by them, and applied to the state court for an order requiring them to pay over the full sum collected by them while in possession of the railway property without regard to expenditures. Issue was taken on the allegations of fact contained in the application and affirmative matter alleged, to which the state receivers made reply. In the meantime, the issues in the main action were completed, and the cause stood ready for trial on such issues, and also on the collateral issues raised between the receivers.

The cause was then pending in the department of the superior court of King county presided over by Judge Frater. In January, 1913, Judge Kauffman of Kittitas county was a visiting judge in King county, called in to aid in the disposition of causes then pending. This cause was among the causes assigned to Judge Kauffman for trial. Judge Kauffman assumed that the entire issue was submitted to him for determination, and on January 15, 1913, consolidated the receiver proceedings with the main action and, without objection on the part of any one, entered upon the trial of the consolidated cause, concluding the trial on March 15, 1913. On April 1, 1913, he filed a written opinion on the issues presented in both the main case and the receiver proceedings, in which he announced the conclusions reached by him therein. Subsequently, and on May 17, 1913, he signed findings of fact and conclusions of law, proposed by counsel for the defendants on the issues presented in the main case, which were filed with the other proceedings in the cause in King county. The matter was then suffered to rest, in so far as proceedings before Judge Kauffman were concerned, until March 13, 1915. In the meantime, however, Judge Frater made repeated orders in the cause relative to the conduct of the receivers, and heard and settled a large number of claims of creditors against the railway company presented to the receivers.

On the date last mentioned, the counsel for the defendants in the main issue, and counsel for the Federal receivers in the

receivership proceedings, served notice on the appellant and the state receivers that they would, on April 3, 1915, apply to Judge Kauffman, at Ellensburg, Washington, for a judgment in the main action, in accordance with his findings and conclusions made shortly after the trial of the action, and for findings, conclusions and judgment in the receivers' ancillary action tried therewith, in accordance with the opinion of the court filed as before stated, copies of the proposed judgments and findings being attached to the notice. When this notice was served upon the state receivers, they applied to this court for the issuance of an alternative writ of prohibition against Judge Kauffman, prohibiting him from taking further proceedings in the cause until the further order of this court. The writ was issued, and Judge Kauffman directed to appear and show cause on a day certain why he should not be permanently restrained from proceeding further in the cause.

The first contention made on the part of the receivers is that Judge Kauffman is now without jurisdiction to enter a judgment in the cause. This contention seems to be based on two grounds, the first of which is that his power to do so does not follow him into Kittitas county, the county in which the notice recites the application is to be made; and the second is that he has lost jurisdiction by lapse of time. But we think neither of those contentions well founded. The first is concluded against the appellant by the statute. By § 42 of Rem. & Bal. Code, it is provided that:

"Any judge of the superior court of the state of Washington who shall have heard any cause, either upon motion, demurrer, issue of fact, or other matter in any county out of his district, may decide, rule upon, and determine the same in any county in this state, which decision, ruling and determination shall be in writing and shall be filed immediately with the clerk of the county where such cause is pending."

This section of the statute clearly authorizes a judge of one county or district within the state, who sits in the trial

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of a cause in another county or district, to determine and enter a judgment in such cause while in any county of the state. Judge Kauffman, in this instance, is but asked to determine the cause while in his own county, and will be acting within his rightful powers if he does so.

As to the second objection, the delay on the part of the defendants in moving for judgment after the court had announced its conclusion did not work a loss of jurisdiction. The plaintiff or the receivers could doubtless have appeared in the cause at any time after the court announced its conclusion and caused findings of fact and conclusions of law to be made and a judgment entered in accordance therewith, or could have required the prevailing party to submit for the court's approval findings and conclusions, and, perhaps, may have had a dismissal if such party failed to comply with the order, but they cannot themselves remain silent, and then claim loss of jurisdiction when the other party moves. *Peirce v. National Bank of Germantown*, 44 Wash. 404, 87 Pac. 488.

The record shows a misunderstanding between Judge Frater and Judge Kauffman as to the issues submitted to Judge Kauffman for trial. Much is in the record concerning this difference, and the receivers ask us to determine the controversy in this proceeding, and if we find that Judge Kauffman has jurisdiction to proceed at all, to require him to enter a judgment upon the issues we find were actually submitted to him. But we are clear that this controversy has no place in this proceeding. Since we conclude that the court as represented by Judge Kauffman has jurisdiction to enter a judgment in the cause, it follows that he may enter such a judgment as he deems the facts and the law warrants. Prohibition arrests the proceedings of a court when such proceedings are without or in excess of the court's jurisdiction; Rem. & Bal. Code, § 1027 (P. C. 81 § 1781); it does not arrest the erroneous exercise of acknowledged jurisdiction.

"The writ of prohibition will not be issued as of course, nor because it may be the most convenient remedy. Nor will it be allowed to take the place of an appeal, or perform the offices of a writ of review. It is a preventive remedy, and as such is bounded by rigid rules, and is only issued in cases of extreme necessity. The remedy is employed only to restrain courts and inferior tribunals exercising judicial functions from acting without or in excess of their jurisdiction; and, if the court or tribunal sought to be restrained has jurisdiction of the subject-matter in controversy, a mistaken exercise of its acknowledged powers will not justify the issuance of the writ. Stated in another way, 'it matters not whether the court below has decided correctly or erroneously; its jurisdiction being conceded, prohibition will not go to prevent an erroneous exercise of that jurisdiction.'" *State ex rel. Lewis v. Hogg*, 22 Wash. 646, 62 Pac. 143.

So, in the case at bar, if the receivers conceive that the findings and judgment proposed by the defendants are not warranted by the facts in evidence, their remedy is to contest the question before Judge Kauffman, and, if unsuccessful, follow the usual corrective remedies for relief against erroneous judgments.

It was said at the argument that the status of the matter in litigation had materially changed since the conclusion of the hearing before Judge Kauffman, and for this reason a judgment appropriate at that time would be inappropriate at this time, and the entry of such a judgment as the defendants propose might prove embarrassing, owing to the orders subsequently made in the receivership proceedings by the judge sitting in King county. But if this be so, the proper place to make the showing is before Judge Kauffman.

The subsequent orders made by the court in King county did not deprive Judge Kauffman of the power to pass on the matters submitted to him, and if they have so far changed the conditions as to render inappropriate now a judgment that would have been appropriate when the hearing before Judge Kauffman was concluded, unquestionably he will make the necessary changes, if reason therefor be shown him.

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Statement of Case.

At the least, he is entitled to the opportunity, and this court should not interfere until he has been given that opportunity.

The temporary writ is quashed and the permanent writ denied.

MORRIS, C. J., ELLIS, PARKER, and MAIN, JJ., concur.

[No. 12826. Department Two. August 4, 1915.]

THE STATE OF WASHINGTON, *Respondent*, v.

LOUIS G. ENGSTROM, *Appellant*.¹

CRIMINAL LAW—APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS TO INSTRUCTIONS. Error cannot be based upon the refusal or failure of the trial court to give an instruction on the subject of the testimony of an accomplice, where the record fails to show any exceptions called to the attention of the court at or before the motion for a new trial was heard.

CRIMINAL LAW — TRIAL — MISCONDUCT OF COUNSEL — ARGUMENT. Prejudicial error cannot be based on misconduct of state's counsel in argument to the jury which did not pass beyond the bounds of legitimate argument, and much of which was called out in reply to improper argument on the part of counsel for accused.

CRIMINAL LAW—EVIDENCE—ACCOMPLICES—CORROBORATION. A conviction may be sustained on the uncorroborated testimony of an accomplice, without any precautionary instruction, if none was requested.

APPEAL — STATEMENT OF FACTS — CERTIFICATE — SUPPLEMENTAL STATEMENT. A mandate to the trial court to correct or supplement its statement of facts, being discretionary, will not be issued where there is no reasonable certainty that the appellant is being denied any rights; as when it appears that the trial judge refused a supplemental statement as to the taking of alleged exceptions, on the ground that he did not so remember the facts, and that there was no record from which the truth could be ascertained; especially where there was lack of diligence in seeking the mandate.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 29, 1914, upon a trial and conviction of larceny. Affirmed.

¹Reported in 150 Pac. 1173.

Joseph M. Glasgow and Robert M. Waite, for appellant.
Alfred H. Lundin and Walter F. Meier (Thomas J. L. Kennedy on the brief), for respondent.

FULLERTON, J.—Louis G. Engstrom was convicted of the larceny of a quantity of chocolate, and appeals from the sentence pronounced upon him.

At the time of the alleged theft, Engstrom was an employee of the Superior Candy & Cracker Company, a concern doing business in the city of Seattle. The principal witness against him at the trial was one Stern, a junk dealer, also doing business in the city of Seattle. Stern testified that, at various times, he had bought sacks and other forms of junk from the cracker company; that, at one of such times, he met Engstrom at the cracker company's place of business, and was informed by him that he had a certain quantity of chocolate for sale; that he made a deal with Engstrom by which Engstrom agreed to deliver to him, between six and seven o'clock on the next morning, at the alley door of the cracker company's place of business, three hundred pounds of chocolate; that he appeared there on the next morning at the time agreed upon, with an express wagon driven by its owner, received the chocolate, paid Engstrom the price agreed upon, and had the chocolate hauled to his warehouse. He testified further that he knew the chocolate had been stolen by Engstrom when he received it from him. His evidence is not clear whether he knew at that time from whom it had been stolen, although it appears that he made subsequent purchases from the same source, and learned at one of such times that all of it had been stolen by Engstrom from the cracker company.

Engstrom's counsel conceived that Stern had, by his testimony, shown himself to be an accomplice of Engstrom, and at the proper time, during the course of the trial, submitted an instruction based on that theory, which he requested the court to give to the jury. The court heard arguments on the request but, in so far as the record discloses, made no formal

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ruling thereon. Nor did it, in its instruction to the jury, later give the requested instruction, or instruct the jury in its own language upon the subject-matter of the request.

The failure of the trial court to give the requested instruction, or to instruct the jury in its own language on the subject-matter of the request, constitutes one of the principal assignments of error in this court on the appeal. The appellant, however, is met with the objection that he cannot be heard in this court on the assignment because he did not take the proper exceptions to the refusal of the court to give his requested instruction, or proper exceptions to its refusal to instruct on the subject-matter requested. The objection seems to be well founded. The record is barren of any exception whatsoever, save that it appears that, at some time after the trial, the appellant filed with the clerk of the court certain written exceptions to the failure of the court to give the requested instruction, but it does not appear that these were called to the attention of the trial court at or before the motion for a new trial was heard. This we have held, in a long line of cases, will prevent a review by this court of any claim of error based thereon. *State v. Neis*, 74 Wash. 280, 133 Pac. 444, and cases there collected.

A second claim of error is based on the concluding argument of the state's counsel, made to the jury on the facts of the case at the conclusion of the court's instructions. But a careful reading of all that the record contains does not convince us that it passed the bounds of legitimate argument. Much that is complained of was said in answer to arguments used by the appellant's counsel, who seems not to have been sparing in the use of abuse and invective. When counsel indulges in this line of argument, he can hardly legitimately complain if the opposing counsel replies in kind.

It is complained, also, that the evidence is insufficient to justify a conviction. This complaint is founded on the contention that Stern was an accomplice of the appellant, that his testimony was uncorroborated, and that a conviction can-

not stand on the uncorroborated testimony of an accomplice. There is a discussion in the brief as to whether or not Stern was in fact an accomplice of the appellant, but seemingly the question is of little moment here. The evidence of an accomplice is regarded as untrustworthy because of the moral delinquency implied in the confessed dishonesty of the witness, and clearly there cannot be much difference in this regard between one who actually engages in theft and another who knowingly takes the fruits of the theft and traffics in it for his own profit. But it is not the rule in this state that a conviction cannot stand on the uncorroborated testimony of an accomplice. On the contrary, the rule is the other way. While we have held that the defendant is entitled to a cautionary instruction against a conviction on the uncorroborated testimony of an accomplice, if he requests it, we have uniformly held that such testimony is sufficient to sustain a conviction. *State v. Macleod*, 78 Wash. 175, 188 Pac. 648; *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989; *State v. Mallahan*, 66 Wash. 21, 118 Pac. 898; *State v. Dalton*, 65 Wash. 663, 118 Pac. 829; *State v. Stapp*, 65 Wash. 438, 118 Pac. 387; *State v. Jones*, 53 Wash. 142, 101 Pac. 708.

The appellant, realizing that the record might be adjudged insufficient to enable him to have reviewed the question relating to the failure to instruct, presented to the trial court a supplemental statement embodying the facts he conceived to be omitted from his original statement. The judge refused to certify to the proposed supplemental statement for the reason, as the minutes of the court recite, that he did not remember the facts as the applicant recited them, and that there was no record kept of the proceedings from which his memory could be refreshed. A short time prior to the hearing on the merits of the appeal, the appellant applied to a department of this court for a writ of mandamus directed to the judge of the lower court who presided at the trial, commanding him to show cause why he should not certify the supplemental transcript as directed. The department refused the

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application, and the appellant renewed the application at the time appointed for the argument on the merits.

It is our opinion that the application must be denied. Conceding that the trial judge may supplement the statement of facts at any time before an appeal is heard, under § 391 of Rem. & Bal. Code (P. C. 81 § 689), and may be compelled to do so by a mandate issued out of this court (*State ex rel. Klein v. Superior Court*, 36 Wash. 44, 78 Pac. 137), it does not follow that the mandate must issue as of course upon application being made therefor. On the contrary, the issuance of the writ is discretionary, and before the court will direct its issuance it must appear with reasonable certainty that the appellant is being denied some right guaranteed him by the statutes relating to appeals. In this record it does not so appear. True, the appellant alleges in his application for the writ that he did take proper exceptions, but his application also shows that, when he made his application in the court below, it was denied on the ground that the judge did not so remember the facts, and that there was no record or other form of memoranda from which the truth could be ascertained. To determine the issue would, therefor, require a reference and hearing, with no reason to believe that any definite or certain result could be reached. The fault, moreover, that the record is in this condition is the appellant's. By the exercise of only ordinary diligence, he could have so far perfected the record as not to leave the matter in doubt. Again, the statute permits the record to be supplemented only at some time "before the appeal is heard." This application was made at the time the appeal was heard and some thirty days or more after the cause had been noted on the appeal calendar for such hearing. This utter lack of diligence does not appeal strongly for the exercise of power discretionary with the court.

For the foregoing reasons, we conclude that the application should be denied, and the judgment affirmed.

MORRIS, C. J., CROW, CHADWICK, and ELLIS, JJ., concur.

[No. 12867. Department One. August 4, 1915.]

JOHN MARKEN *et al.*, *Respondents*, v. AUGUST JACOBS *et al.*,
Appellants.¹

CANCELLATION OF INSTRUMENTS—EVIDENCE—SUFFICIENCY. The presumption that a deed of lands, sold for taxes, from the tax title grantee to the former owner's son-in-law, evidences the true state of the title, subject to an admitted right of use by the father-in-law and his wife, is not overcome by clear, cogent and convincing evidence, where it appears that the land was paid for by money borrowed upon a joint note secured on the personal property of each, that the son-in-law desired to preserve a home for the old people, who continued to live on the land and had the use of the same in consideration of the payment of the taxes, the son-in-law meanwhile making various improvements by building fences and buildings, without objection by the old people.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered August 17, 1914, upon findings in favor of the plaintiffs, in an action for equitable relief, tried to the court. Reversed.

E. C. Dailey, for appellants.

L. N. Jones and *Jones & Clark*, for respondents.

CHADWICK, J.—Prior to April 18, 1902, respondents were the owners of a certain forty-acre tract of logged-off land in Snohomish county. On April 18, 1902, it was sold for taxes to third parties. Thereafter the purchasers at the tax foreclosure sale sold the property, which they testify was worth \$1,000, to appellant August Jacobs. Appellants are the son-in-law and daughter of the respondents. Appellant August Jacobs, either at his own instance or at the request of respondent John Marken, entered into negotiations for the purchase of the land. The purchase price was paid with \$300 borrowed from one Martin. This was repaid out of the sale of shingle bolts which Jacobs and Martin took from the land, Marken being allowed \$1 per cord. Respondents

¹Reported in 150 Pac. 1161.

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continued to live upon the land and to improve it in a small way. They cleared about four acres and dug some ditches and slashed and burned about thirty-five acres. They paid the taxes up to two years before the trial. In 1912, appellants sold the place where they then resided and moved on the land, without any objection on the part of respondents, and proceeded to improve and cultivate all that was susceptible of cultivation, except a garden patch which was taken care of by the respondents. They built a house worth from \$1,200 to \$1,500, a milk house, a walk for the cows, and some fencing, aside from general repairs.

Appellants assert that it was their purpose to buy the land so as to preserve a home for the respondents, who were, at the time of the trial, respectively sixty-nine and sixty years old, and that all that they expected of the old folks was to pay the taxes from year to year. Respondents assert that title was taken in the name of appellant August Jacobs to protect the land from a prior and unsatisfied mortgage. The note for the \$300 was signed by both Marken and Jacobs, and the chattel mortgage which was given to secure it covered the personal property of each of them. Testimony of several witnesses tends to show that Jacobs said in the beginning that he wanted to buy the property for the old folks, one of the sellers saying that it was because of this fact that he sold at a price so far under the true value of the property. On the other hand, the deputy assessor who assessed the property for the years 1905-6-7 and 1914, testifies that Marken always told him the land belonged to Jacobs. The deputy who assessed the land in 1908 testifies concerning the listing of personal property, and further, " 'this seems to be your property, but this land belongs to somebody else.' 'Yes,' he said, 'my son-in-law,' and I remembered Mr. Jacobs when he used to be around Pilchuck, and I said, 'Where does he live now?' 'He lives over around Cedarhome.' And I said 'He owns this land?' 'Well,' he said,

'it is in his name.' He said, 'It is all in the family, anyway.' "

Respondent John Marken testified:

"Q. Did you have any agreement with Jacobs that you were to have the use of the land for paying the taxes on it? A. Yes, sir, there was an agreement with him that I should pay the taxes. Q. And you were to have the use of the land? A. Yes, sir. Q. You were to have what you got off the place? A. Yes. Q. You paid the taxes, did you? A. Yes, sir. Q. How long? A. Well, I paid them until the last two years. Q. You paid them until the two last years? A. Yes, sir. Q. And you had everything from the place, didn't you? A. Yes, sir. Q. You had whatever there was there? A. Yes, sir. Q. Had the use of the ground, the orchard and— A. Yes, sir. Q. And whatever there was there you had? A. Yes, sir. Q. And for that you paid the taxes? A. Yes, sir. Q. And you had that understanding with Mr. Jacobs, did you? A. Yes, sir. Q. How old are you, Mr. Marken? A. I am sixty-nine. Q. How old is Mrs. Marken? A. Oh, she is about sixty. Q. Has Jacobs built any fencing on the place? A. Oh, yes. Q. He has built some fences there. He built a house and a milk-house, you say? Is that right? A. He built the milk-house, yes. He has got two— Q. Built a house and a milk-house and— A. Two milk-houses. Q. What did he build? Two milk-houses? A. Yes, sir, he has got two milk-houses. Q. And the house? A. And I have got one."

Respondents made no objections to the building of the buildings, nor was there a resort to any of the legal remedies which were at hand to protect respondents from the alleged trespass of the appellants. The parties were on friendly terms until about the time this action was commenced.

There is a presumption that a deed evidences the true state of a title, and evidence to overcome it must be clear, cogent and convincing. We think this presumption has not been overcome. We find that the title to the property is in appellants, subject to the right of the respondents to live upon the land during their lifetime. This is admitted by appellants.

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We have not overlooked the fact that another son-in-law testified that, at about the time the land was purchased, appellant August Jacobs said that he did not intend to keep the land, but would deed it back when respondent John Marken got on his feet again; but when measured by all the facts and subsequent conduct of the parties, such admission, if made, is not enough to overcome the position of appellants; that is, that they own the property subject to respondents' right to live upon it during their lifetime.

Reversed, with directions to enter a decree accordingly.

MORRIS, C. J., MAIN, MOUNT, and HOLCOMB, JJ., concur.

[No. 12214. Department Two. August 5, 1915.]

GEORGE A. CLOUGH, *Respondent*, v. ELLEN S. H. MONRO,
AND ELLEN S. H. MONRO, *as Guardian of C. E. Monro*,
*an Incompetent Person, Appellants.*¹

CORPORATIONS—TRANSFER OF STOCK—ASSIGNMENT—CONSIDERATION. A credit on a loan to the assignor, is sufficient consideration for an assignment of mining stock, and it would be a sufficient consideration that the assignment was made as partial security for the loan.

PRINCIPAL AND AGENT—PROOF OF AGENCY—STATEMENTS OF AGENT. Neither the fact of agency nor the extent of the agent's authority can be proved by admissions or declarations of the agent to third persons in the absence of the principal.

WITNESSES—EXAMINATION—REITERATION. It is not error to curtail the examination of a witness by excluding reaffirmations of his former testimony.

APPEAL—REVIEW—HARMLESS ERROR. On a trial *de novo*, the improper exclusion of a letter which is in the record, is harmless error.

INSANE PERSONS—ACTIONS AGAINST—GUARDIANS—PROCESS. Under Rem. & Bal. Code, § 1670, authorizing service of process upon the guardian of an incompetent, an action against an incompetent may be brought in form, and entitled in the caption, against the guardian as such.

¹Reported in 150 Pac. 1190.

SAME—ACTIONS AGAINST—LIMITATION. Rem. & Bal. Code, § 1477, requiring suits on claims against estates of decedents within three months after rejection of the claims does not apply by analogy to claims against the estate of an incompetent person, and the same are not barred three months after rejection.

PLEADING—ADMISSIONS—FAILURE TO DENY. A general allegation that defendant was the duly, appointed, qualified and acting guardian of an insane person, not moved against or denied, sufficiently establishes the guardianship.

PLEADING—ANSWER—ADMISSIONS. An answer to a specified paragraph of a complaint, admitting that a claim against a guardian was presented and rejected, and denying that any sum was due, is a sufficient admission of the presentation and rejection of the particular claim alleged in such paragraph.

INSANE PERSONS—ACTIONS—AUTHORITY OF GUARDIAN—ADMISSIONS. The guardian of an incompetent person, defending an action on a claim against the estate, has power, when acting in good faith, to admit the presentation and rejection of a claim therefor, the facts being within the personal knowledge of the guardian.

HUSBAND AND WIFE—GUARDIANS—ACTIONS—JUDGMENT—COMMUNITY OR SEPARATE DEBT. A judgment upon a community debt against the wife of an insane person "as guardian of the estate of her husband, M. . . . and against the marital community" of the two is not a personal judgment against the wife enforceable against her separate estate.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 28, 1914, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

A. W. Buddress, for appellants.

Shorett, McLaren & Shorett, for respondent.

ELLIS, J.—This action was brought to recover the balance due on a contract for the sale of certain mining stock. On November 21, 1912, at San Francisco, California, C. E. Monro entered into a contract with J. P. Clough, brother of the plaintiff, whereby Monro agreed to purchase from J. P. Clough 10,000 shares of the capital stock of the Dwyer-Libby Mining & Development Company, a Nevada corpora-

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tion operating a leased mine in that state, for the sum of \$2,000. Two hundred and fifty dollars was paid at the time of the sale, and the balance was agreed to be paid in seven monthly installments of \$250 each, the deferred payments bearing interest at six per cent. Subsequent to the date of the contract, the purchaser paid an additional \$250, leaving a balance of \$1,500 unpaid principal. On November 26, 1912, J. P. Clough assigned the contract to the plaintiff. Both the contract of sale and the assignment are evidenced by written memoranda.

In December, 1912, Monro sent \$1,500 to the Quinn River Bank, in Nevada, for the use of the Dwyer-Libby Mining & Development Company, and it is admitted that the money was so used by that company. In March, 1913, the Dwyer-Libby Company forfeited its lease of the Nevada property and a new company was immediately organized which took a lease of the same property. The new company, the Charleston National Mining Company, was organized by J. P. Clough, who was formerly connected with the Dwyer-Libby Company. C. E. Monro was adjudged insane on May 24, 1913, and his wife, Ellen S. H. Monro, was appointed guardian of his estate.

There is no question raised as to the existence of the contract and the payment thereon of \$500, but the defendants, in their answer, allege that it was subsequently agreed that the \$1,500 advanced by Monro to the Dwyer-Libby Company should be credited on the contract in suit.

The court made findings to the effect that C. E. Monro is an incompetent, and that Ellen S. H. Monro is the guardian of C. E. Monro, and that the guardian and the incompetent are husband and wife; that C. E. Monro entered into the written contract with J. P. Clough for the purchase of the stock, and that J. P. Clough assigned the contract to plaintiff; that the contract was made by Monro on behalf of himself and the marital community consisting of himself and wife; that no part of the contract price of \$2,000 has been

paid except \$500; that on or about June 25, 1913, plaintiff presented his verified claim to the guardian for \$1,553.33, and that the claim was rejected and disallowed on or about July 7, 1913. The court thereupon concluded that the plaintiff is entitled to judgment against the defendant, as guardian, and against the marital community consisting of defendant and the incompetent in the sum of \$1,620.55, together with costs and disbursements. Judgment went accordingly. Defendants appeal.

We shall consider the appellants' several contentions, discussing the evidence and the pleadings in connection therewith so far as necessary. Throughout their briefs the appellants repeatedly assert that the contract in suit was procured through fraud collusively practiced by the respondent and his brother, J. P. Clough, on C. E. Monro, and that Monro was at the time mentally incompetent. We shall not consume time and space in discussing either of these claims. It is sufficient to say that neither of them was raised by the pleadings and neither of them is sustained by the evidence.

It is also asserted that the assignment of the Monro contract from J. P. Clough to respondent was without consideration, and that J. P. Clough could, therefore, deal with the contract as he saw fit. As to the consideration for this assignment, the respondent testified, in substance, that he and J. P. Clough together purchased 100,000 shares of stock of the Dwyer-Libby Company from one Dwyer for \$5,000; that the respondent advanced to his brother \$2,500 to pay his half of the purchase price; that the stock purchased by Monro from J. P. Clough was a part of this stock, and that the assignment of the contract was made in consideration of a credit on this \$2,500 loan. J. P. Clough testified that he purchased the one hundred thousand shares of stock; that he borrowed from the respondent \$5,000 with which to pay the purchase price, and that he assigned the Monro contract to the respondent as partial security for the loan. Whichever view is adopted, it is clear that the respondent was not a

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mere figurehead or trustee. He held both the legal and the beneficial interest, so that his brother retained no right to agree to cancel the contract on any terms without respondent's consent.

The appellants' main contention is that the respondent, through his brother, as agent, agreed that the remittance of \$1,500 made by Monroe to the mining company should be taken as payment of the debt here in suit, and that the court erred in finding that the debt is not fully paid. The facts touching this transaction, as developed by the evidence, are substantially these: J. P. Clough desired that Monroe advance to the Dwyer-Libby Mining & Development Company \$1,500 to be used in developing the mine. Monroe was willing to make the advancement, but desired, in order to do so, to make some arrangement either for payment or for further time on the contract here in question. The respondent testified that he authorized his brother, J. P. Clough, to communicate to Monroe his willingness to accept, as a substitute for the contract, the note of Monroe, signed by the Dwyer-Libby Company and by Nutter and Libby, two other men interested in the mine, the note to be also secured by a mortgage upon Seattle real estate; that this was the only proposition to which he ever assented, and that this proposition was never carried out; that if his brother, J. P. Clough, ever represented to Monroe, or to any one else, that the respondent had consented to allow the \$1,500 sent to the Nevada bank for the use of the mining company to be applied as payment on the contract in suit on any other terms, the respondent never knew or heard of it. On December 21, 1912, J. P. Clough sent a telegram from San Francisco to Monroe at Seattle as follows:

"Your request confirmed. Send fifteen hundred. Wire Sprague at once."

The Sprague referred to was the cashier of the Quinn River Bank. On January 25, 1913, J. P. Clough wrote

Monro a letter containing, among other things which are immaterial here, the following:

"Just sent you a telegram and will explain the situation as it is at present. I took the matter up with my brother and asked him to assist me once more, this he declined to do for two reasons. He thinks the company's note would be very slow in coming. The Co. promised my brother when he allowed you to send the \$1,500 to the mine that they would furnish him ample securities accepted by some reputable bank in Seattle. This they have not done nor mentioned since that date."

J. P. Clough corroborated the respondent's statement that his only proposition was to take a note for the amount due on the Monro contract, signed by Monro, Nutter, Libby and the Dwyer-Libby Company, and further testified to the effect that Monro had wired him that he, Monro, had sufficient security to meet his brother's condition, and that it was in response to that information that the above telegram was sent. After this testimony was admitted, the telegram and letter were ruled out, on the ground that there was no evidence connecting the respondent with them or showing that J. P. Clough had authority to bind the respondent. The then counsel for the appellants thereupon undertook to prove, by reference to certain other telegrams sent by J. P. Clough to Monro and by certain admissions of J. P. Clough to Mrs. Monro, after she was appointed guardian, that he had assumed throughout to act as agent for the respondent. These offers were rejected, the court saying:

"Do you know of any law that has been established any better than that you cannot prove agency by the declarations of the alleged agent?"

From the character of the evidence then offered, it is clear that the court meant declarations to third parties. Though the fact of agency may be proved by the direct testimony of the agent himself (*Bender v. Ragan*, 53 Wash. 521, 102 Pac. 427), neither the fact of agency nor the extent of the agent's authority can be proved by admissions or declarations of the

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alleged agent to third parties in the absence of the supposed principal. *Allen v. Farmers & Merchants Bank*, 76 Wash. 51, 135 Pac. 621; *Larson v. American Bridge Co.*, 40 Wash. 224, 82 Pac. 294, 111 Am. St. 904; *Western Security Co. v. Douglass*, 14 Wash. 215, 44 Pac. 257; *Comegys v. American Lum. Co.*, 8 Wash. 661, 36 Pac. 1087.

Counsel then proceeded to question J. P. Clough as follows:

"Q. You were undoubtedly authorized by your brother to send anything up here which you did send? Mr. McLaren: He has gone over that time and again as to what his brother consented to do and what he would not do. The Court: I sustain the objection. Q. You had the permission or consent of your brother, or the understanding with your brother that you were authorized or directed to send these telegrams and make these statements to Mr. Monroe, weren't you? Mr. McLaren: I object to that as calling for a conclusion of the witness. The Court: Objection sustained."

It is contended that the exclusion of these questions is reversible error. The witness had already in effect answered the same questions. He had testified in detail as to the negotiations with his brother prior to the sending of the \$1,500 by Monroe to the Nevada bank. He had definitely stated that the respondent had refused to consent to any arrangement except the substitution of the note of Monroe, Nutter, Libby and the mining company, secured by Seattle property, for the Monroe contract; that Monroe had telegraphed him to the effect that he had security and that it was in response to that telegram that he wired Monroe to send the money. Had the witness answered the questions propounded in the affirmative, it would not have changed the result. It would have been a mere reaffirmation, as a conclusion, of what he had already testified to. The ground had already been thoroughly covered. There was no error in excluding the question.

It is next urged that the court erred in ruling out the letter and telegram. In view of the explanation to the effect

that the telegram was sent in response to one from Monro that the security would be furnished, we think that the telegram at least was improperly ruled out. The error, however, does not necessitate a reversal. The trial here is one *de novo*. Rem. & Bal. Code, § 1736 (P. C. 81 § 1225). The telegram and letter are both before us with a full explanation of the circumstances under which they were sent. Read in the light of the other evidence, they do not discredit the respondent's claim that he never consented, or authorized his brother to consent, that the remittance to the mining company should be considered a payment on the contract, except upon the substitution of security which was never furnished.

This also disposes of the appellants' further claim that the respondent by his silence, when he learned that the money had been sent, though he talked with Monro several times thereafter, ratified an agreement by his brother that the remittance should be considered a payment on the contract. There is no evidence, however, that even the brother so agreed, either as agent or otherwise. There was, therefore, nothing to ratify. Moreover, even assuming that J. P. Clough had agreed to accept the note of the mining company alone, the evidence shows that no such note was ever furnished. It is obvious that respondent, by mere silence, could not be held to ratify a thing which was never performed.

We are satisfied, from a careful reading of the entire evidence, that J. P. Clough throughout was acting for himself and Monro in an endeavor to raise money for the mine, rather than as agent for respondent. The finding that the debt was not paid is sustained by the evidence. There is no competent evidence to the contrary.

The appellant urges that the incompetent himself was a necessary party defendant, and that the action cannot be maintained against the guardian. In *United States Fidelity & Guaranty Co. v. Howell*, 74 Wash. 596, 134 Pac. 490, we held that, under Rem. & Bal. Code, § 1670 (P. C. 409 § 779), an action against an incompetent may be brought in form,

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and entitled in the caption, against the guardian as such, and that service of summons upon the guardian as such confers jurisdiction to enter judgment against the estate of the ward. We are content to abide by that rule.

Equally futile is the claim that the action is barred because it was not commenced within three months after the claim was presented to the guardian. It is conceded that the statute governing guardianship of incompetents contains no such provision. Rem. & Bal. Code, §§ 1654-1673 (P. C. 409 §§ 747-785). But it is argued that the court, in recognition of a supposed analogy between such guardians and executors of estates of decedents, should adopt the limitation prescribed in Rem. & Bal. Code, § 1477 (P. C. 409 § 349), as to suits on claims against estates in probate. The analogy, however, is more apparent than real. The obvious purpose of the above section is to insure an early settlement of the estate, to the end that the decree of distribution may be entered and the executor or administrator discharged. In the case of a guardian or curator of the estate of an incompetent, no such reason exists. Such guardianships are intended to, and usually do, last during the life and disability of the incompetent. There is, therefore, no reason for a special limitation as to suits on rejected claims. In any event, the courts cannot declare a limitation which the legislature has failed to enact.

It is next objected that there was neither allegation nor proof as to where or by what court the guardian was appointed. In the complaint, it is alleged that C. E. Monro is an incompetent person and that Ellen S. H. Monro is the "duly appointed, qualified and acting guardian of said incompetent person." No motion was made to make this allegation more definite and certain. The answer presents no denial of it. It was clearly assumed, on both sides throughout the trial, that the defendant was the legally acting guardian. To reverse the trial court on this ground would be technical in the extreme.

A kindred objection is urged in that there was no evidence that the claim here involved was ever presented to or rejected by the guardian. In the fifth paragraph of the complaint it is specifically averred that the claim was presented on or about June 25, 1913, and in the sixth paragraph that it was by the guardian rejected and disallowed on or about July 7, 1913. The fourth paragraph of the answer is as follows:

"Answering paragraph V, admit that on or about the date named, plaintiff presented a verified claim to the guardian but denies each and every other allegation in said paragraph contained, and denies that there is a balance of \$1,500 or any other sum due from defendants or either of them to the plaintiff."

In the fifth paragraph of the answer, referring to the sixth paragraph of the complaint, it is admitted "that said claim was rejected and disallowed by the defendant as guardian," but the amount claimed to be due is denied. It is urged that these are denials that this "particular claim" was presented and rejected. There is no merit in this contention.

But it is also urged that the guardian for an infant or an incompetent has no power to admit or to waive proof of anything. In this connection counsel mainly relies upon the decision of this court in *Mattson v. Mattson*, 29 Wash. 417, 69 Pac. 1087, holding that, under the statute, Rem. & Bal. Code, § 1662 (P. C. 409 § 763), imposing the duty upon the guardian to defend all actions against his ward, the guardian is without authority to enter into a stipulation to abide the result of an action under the defense interposed by another party. That decision is clearly correct. Such a course would be to shirk the direct mandate of the statute, which is a very different thing from an admission of a fact necessarily known to the guardian, in connection with a *bona fide* defense by the guardian of an action against the ward's estate. Substantially the same provision is found in the statute relating to the duty of the guardian of an infant, Rem.

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& Bal. Code, § 1636, subd. 5 (P. C. 409 § 709), and also in the statute relating to the appointment of a guardian *ad litem* to defend for a minor, Rem. & Bal. Code, § 1644 (P. C. 409 § 725). Yet this court has held that guardians of infant heirs may, when acting in good faith, admit in their pleadings in partition proceedings that certain land in controversy is the community property of the parents of their wards, notwithstanding the fact that the admission may be prejudicial to formerly asserted claims. *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671. It is not pretended that the guardian here was not acting in good faith. Nor is it claimed that the admission in her answer was contrary to the fact. We are not required to go so far as this court went in the *Kromer* case to sustain the admission here. The admission was of a fact necessarily within the knowledge of the guardian, and not of any fact touching antecedent dealings with the ward nor going to the merits of the claim itself.

While we have held that an executor or administrator has no power to waive the statute of nonclaim, Rem. & Bal. Code, § 1479 (P. C. 409 § 353), providing that no holder of a claim against an estate shall maintain an action thereon unless a claim shall have been first presented (*Ward v. Magaha*, 71 Wash. 679, 129 Pac. 395), we have never held that the guardian, or even an administrator, may not admit the fact that the claim was actually presented and rejected. The very power of the guardian to reject a claim when presented implies the power to admit the justice of a claim and allow it. In view of this power, it would seem to be an extremely harsh and technical rule which would permit the guardian for the first time, on appeal, to raise the question of lack of proof of presentation of a claim, which presentation she admitted in her pleadings in the court below, and the truth of which admission she does not even now impugn. Were there any circumstance in this case raising a suspicion of collusion or lack of good faith on the part of the guardian in making this

admission, or anything raising a doubt as to the truth of the admission, a different case would be presented, but nothing of this kind is suggested.

Finally, it is contended that the court erroneously entered a personal judgment against Mrs. Monro. The judgment itself negatives this claim. It reads as follows:

"It is hereby ordered, adjudged and decreed, that the plaintiff, Geo. A. Clough, do have and recover of and from the said Ellen S. H. Monro as guardian of the estate of her husband, C. E. Monro, an incompetent person, and against the marital community consisting of said Ellen S. H. Monro and said C. E. Monro, in the sum of \$1,620.55. . . ."

The debt was admittedly contracted during the existence of the marital relation of Monro and wife. It was the personal debt of Monro and of the community consisting of himself and his wife. The judgment, by its terms, is one which can only be satisfied out of the separate property of the incompetent and the community property of the incompetent and his wife. It cannot be construed as a personal judgment against Mrs. Monro or as binding her separate property.

We find no error in the record which would warrant reversal. Judgment affirmed.

MORRIS, C. J., CROW, MAIN, and FULLERTON, JJ., concur.

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[No. 12669. Department One. August 5, 1915.]

EVA P. DRUSE *et al.*, *Appellants*, v. PACIFIC POWER & LIGHT
COMPANY, *Respondent*.¹

APPEAL—REVIEW—HARMLESS ERROR. Error in giving or refusing instructions is harmless, where recovery cannot be had in any event.

ELECTRICITY—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. A farmer, moving a hay derrick underneath high power electric wires, was guilty of contributory negligence, precluding any recovery for his death, where he drove the derrick against telephone wires with such force as to draw the poles together and cause high power lines above to sag and come in contact with the derrick, it being evident that the clear way might not be sufficient, and from past experience he was aware of the danger of contact, and where, after the contact was established and obvious, instead of having the current cut off, he approached, over the protest and warning of others, to within a foot of a charged cable, and within two or three feet of a log chain which was spitting fire, and received a shock of electricity through a hemp rope which he had attached to the charged derrick in an attempt to lower it.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered March 14, 1914, upon the verdict of a jury rendered in favor of the defendant, in an action for wrongful death. Affirmed.

Williamson & Luhman, for appellants.

Englehart & Rigg and *John A. Laing*, for respondent.

CHADWICK, J.—In attempting to move a hay derrick under a high power transmission line belonging to the respondent, John L. Druse came in contact with the electric current and was instantly killed. This action is by his widow and children. From an adverse verdict of a jury, plaintiffs have appealed.

The power line consists of three high tension wires, one set on the top of the pole, and one on each end of a cross-arm set a slight distance below. Under the cross-arm, a telephone line consisting of several wires had been strung.

¹Reported in 150 Pac. 1182.

When negotiating for a right of way, Mr. Druse and the agent of the company negotiated with reference to the height of the line and his derrick. He presumably knew the danger of a contact with the line and the necessity of obviating it. Prior to 1911, the derrick had come up to the telephone wires, "and Mr. Druse climbed up and lifted the telephone wires over the top." In the summer of 1911, the derrick came in contact with the power line and broke it in two. The shock knocked the horses down on their knees. The wires "burned right in two." Mr. Druse was present in the field. He was helping move the derrick but had "stopped back to shut the gate." Thereafter respondent raised the wires between two poles at the request of Mr. Druse, so that the high power wires were 44 feet 3 inches from the ground on one, and 44 feet 7½ inches on the other. The telephone wires were raised to a height of 40 feet 5½ inches and 40 feet 3 inches. The mast of the derrick was 38 feet 6 inches high.

It is not contended that there was any danger from the electric current in the telephone wires. There was a sag of four or five feet in the power wires and also some sag in the telephone wires. The derrick was rigged on a mast set upon runners made of large timbers. The outfit was dragged from place to place by two teams of horses.

In July, 1912, Druse, with others who were in his employ, was moving the derrick under the power line. The top of the mast came in contact with the telephone wires. The force of the contact was such that the two poles were pulled together, allowing the power wires to sag far enough to come in contact with the derrick. The derrick was rigged with two wire cables called the supporting cable and the pull cable. The one supported the arm of the derrick; the other was used to pull the hay onto the stack. We shall adopt appellants' narrative:

"One end of the supporting cable was attached to the end of the arm of the derrick, ran through the pulley on the top of the mast, and thence ran to the cross-beam to which it was

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attached by a rope at a point to the left of the mast, the rope running around the beam and over an iron hook attached to the end of the cable. This cable did not reach the ground and showed no signs of electricity due to contact with the power line, the distance from the iron hook to the ground being too great for the electricity to flash over. The pull cable ran down from the head of the mast through a pulley attached to the cross-beam supporting the mast at a point to the right of the mast, and was then dragging along the ground about 40 or 50 feet back from the derrick. The distance between the points where the pull cable was attached to the beam and the point where the supporting cable was attached was $31\frac{1}{2}$ feet. After coming in contact with the power line, the pull cable showed signs of electricity where it struck the ground. The pulley through which this pull cable ran was attached to the cross-beam by an iron chain, the ends of the chain hanging down to the ground. This chain also showed signs of electricity where it was in contact with the ground. Except as stated, no other parts of the derrick showed signs of electricity except at the point of contact of the mast with the high tension wire. The progress of the derrick was stopped by the wires, and thereupon Druse, after observing the situation of the derrick, attempted to lower the arm of the derrick by unloosening the supporting cable where the same was attached to the cross-beam by a hemp rope. This cable was tied with a slip knot, so that it could be easily loosened, the end of the rope being first looped over the iron hook and then allowed to drag on the ground. Druse took hold of the rope about a foot from the cross-beam and then removed this loop from the iron hook. He then attempted to jerk the rope loose, but before making the pull necessary to loosen same, received a shock of electricity through the rope which resulted in his death; a period of 4 or 5 minutes having elapsed between the time the derrick struck the wires, and the time when he was killed. At no time prior to his death was Druse closer to the cable and chain showing indications of electricity than 2 or 3 feet, and the undisputed testimony shows that the electric shock received by Druse came through the hemp rope held by him and the apparently dead supporting cable."

We think the record will bear the stronger statement that there was a "rumbling" "crackling" "loud noise" and "blue

flames" and a "spitting" of electricity which was "apparently continuous;" that sparks were flying from the metallic parts of the derrick, except the fall of the supporting cable—it showed a contact at the block at the top of the mast—and that the grass was burning where it came in contact with the pull cable, which was dragging 40 or 50 feet back on the ground. It was evidently Druse's idea that if the supporting cable, which was tied to the mast by a hemp rope, was released and the arm pulled away from the wire, that the derrick would be freed of the contact. He accordingly directed one of his men to go into the framework of the derrick and untie the rope and let the arm down so they could proceed. This the man refused to do, saying "Not on your life. I wouldn't go in there for ten thousand dollars." The log chain was spitting fire and there was some smoke but no fire in the derrick.

A witness testifies to his recollection that one of the men said to Mr. Druse when he was about to take hold of the rope, "keep away from there." Another witness, who qualified as an expert electrical engineer, expresses the opinion that both cables were equally alive, but that no sparks came from the fall of the supporting cable because the end of it was too far from the ground.

Appellants allege negligence on the part of the power company in the construction of its line at such a height as would not allow the free passage of the hay derrick, and the fact that the wires over Druse's premises were not protected by guard wires or otherwise, and in the fact that the automatic oil switches were not adjusted and operated properly so as to cut off the current at the time of contact. Respondent pleads the general issue and contributory negligence. A motion for nonsuit was overruled, as was also a motion for a directed verdict.

Before argument, counsel for appellants withdrew the charges that respondent had no safety devices and that the wires were not properly insulated. The only charge remain-

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ing is that respondent had not erected its pole line and placed its wires high enough to permit a free passage of the hay derrick. This charge and the plea of acquittance are the only questions before us. The assignments of error all go to the instructions of the court, but we think they are immaterial in the light of the evidence. We have held that we will not reverse a case for error in giving or refusing to give instructions where a recovery cannot be had in any event. *Nilsson v. Martinson*, 72 Wash. 286, 130 Pac. 106.

Admitting that respondent's wires were not high enough to permit a free passage of the derrick, we think Mr. Druse was clearly guilty of contributory negligence and that such negligence was the proximate cause of his death. The day was a clear day. There was nothing to obscure his sight. The derrick was moved slowly across the field. It must have been apparent to a casual observer that the clear way might be insufficient, in plenty of time to stop the derrick so as to avoid the contact. He might have done as he did the year before under a like condition, climbed the mast and passed the telephone wires over its top. Mr. Druse was a man of more than ordinary intelligence, and from all the prior circumstances must have known the danger of a contact with an electric current. Instead of going carefully about his work, he drove into the telephone wires with such force as to draw the tops of the two poles, set three feet in the ground, toward each other, permitting the inevitable consequence, the dropping or sagging of the power line to a point of danger. We had omitted to say that on each pole across Mr. Druse's farm there was a tin sign warning against the danger of tampering with the wires.

But up to this point decedent was in no danger. Indeed, he was charged with a higher duty to protect himself. It was then immaterial how the condition arose. It was enough that it existed. It was open, obviously dangerous and known to be deadly. Instead of keeping away from it until the company could be telephoned to cut off the current, as

was done immediately after the accident, Mr. Druse, over the protest and warning of at least two of his men, deliberately set about to correct the situation, placing his hands within a few inches, or at most within a foot, of the hook on the end of the supporting cable, and within two or three feet of the log chain, which was spitting fire.

Counsel make much of the fact that the witness who refused to untie the rope that held the supporting cable, saying "Not on your life" and "I would not go in there for ten thousand dollars," followed Mr. Druse and was within a foot or two of him and was prepared to assist him at the time he took hold of the end of the loop.

We attach no importance to this circumstance. In the psychology of human nature there is nothing more prominent, or more to be wondered at, than the fact that a man will do something in company with another that he would never do by himself. This is especially true when there is a seeming imputation of cowardice, and it matters not whether the charge is made by spoken words or is insinuated by the conduct of another. The question here to be decided is whether Mr. Druse acted the part of prudence, and his act is not to be measured by the act of a third party who assumes to measure lances with him on the field of personal or physical courage.

Can there be any difference in the minds of reasonable men as to the negligence of the deceased and the proximate and contributing cause of his death? In other words, with a danger open and obvious, can any one say that he acted as a prudent man should have acted under like circumstances?

We find that deceased was guilty of contributory negligence as a matter of law; that the instructions complained of were not prejudicial for the reason that the jury would probably have returned the same verdict whatever the form of the instructions, or, if it had returned a verdict for the appellants, it would have been the legal duty of the trial court to arrest the judgment.

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Syllabus.

Whether the instructions given are technically correct, and whether the instructions refused should have been given, become, therefore, questions purely academic. The merit of the case is apparent, and the errors assigned are technical and will be disregarded under Rem. & Bal. Code, § 307:

"The court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect."

Affirmed.

MORRIS, C. J., MOUNT, ELLIS, and HOLCOMB, JJ., concur.

[No. 12684. Department One. August 5, 1915.]

JOHN D. DILL *et al.*, *Appellants*, v. ANNA C. BUSH,
Respondent.¹

VENDOR AND PURCHASER — BONA FIDE PURCHASER — CONSTRUCTIVE NOTICE — ATTACHMENT — RECORDATION — LIS PENDENS. In an action commenced in one county, not affecting the title to land, an attachment levied upon land in another county, the title to which is in the defendant, by filing and recording in the auditor's office of such other county a copy of the writ and notice of the levy, as required by Rem. & Bal. Code, § 659, and indexed with defendant as grantor and plaintiff as grantee, as required by Id., § 8787, constitutes a valid lien upon the property to the extent of any judgment entered, preserving the lien, and is constructive notice to a subsequent purchaser from the attachment debtor, without the filing of any notice of *lis pendens*; notwithstanding Id., § 243, relating to the commencement of actions, provides that, in actions affecting title to real property, or whenever a writ of attachment of property shall be issued, the plaintiff may file with the auditor a notice of *lis pendens*; since under § 8787, *supra*, the notice of *lis pendens* is to be recorded and indexed in the same manner as a writ of attachment and notice of levy, and it was not intended to require the recording of both in the same place, in case of an attachment.

¹Reported in 150 Pac. 1162.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered December 31, 1914, upon findings in favor of the defendant, in an action to quiet title, tried to the court. Affirmed.

John D. Dill and Myers & Johnstone, for appellants.

Spence & Denham, for respondent.

HOLCOMB, J.—Plaintiffs in their complaint allege, that they are owners in fee of the land described; that the defendant claims some right or interest therein adverse to them, but that she has no right, title, or interest in the real estate. Defendant answered, setting up a claim of prior lien by virtue of an attachment levied upon the property on August 15, 1913, prior to the time plaintiffs purchased it. The court found and rendered judgment for defendant, respondent here.

The facts found are these: On August 15, 1913, one Littlefield was the holder of the record title to the land, which is situate in Chelan county. On that date, respondent had instituted an action in the superior court of King county against Littlefield, to recover an indebtedness of \$800 and interest. To secure any judgment recovered, she caused an attachment to be issued out of the superior court of King county, on the same date, and levied against the real estate here involved, by filing with the county auditor of Chelan county a copy of the writ, together with a notice of levy executed by the sheriff of Chelan county, which copy of writ and notice of levy were recorded in a volume of records of deeds, and indexed with defendant Littlefield as grantor and plaintiff Bush as grantee. Subsequently Littlefield conveyed the property to one Kaiser, and on about February 1, 1914, Kaiser conveyed it to appellants. Subsequent to the filing of the writ and notice of attachment above mentioned, respondent prosecuted her action against Littlefield to judgment, judgment being entered therein in the superior court of King county on October 14, 1914, for the full sum demanded, with costs; and the judgment recited and preserved

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the lien by attachment on the real estate here involved. The action of Bush v. Littlefield was not in any wise an action for, or affecting the title to, real estate. No *lis pendens* notice in Bush v. Littlefield was filed in the office of the county auditor of Chelan county. Appellants made no examination of the records of Chelan county, and had no actual notice or knowledge of respondent's attachment, which was undischarged and unsatisfied of record and the judgment unsatisfied. The court, however, found and concluded that the levy and notice of attachment in the county auditor's office of Chelan county imparted constructive notice to them and to the world of the existence of the attachment and levy, and constituted a prior, paramount, and superior lien upon the real estate, superior to the title of appellants to the extent of the total amount of respondent's judgment against Littlefield, and that appellants are not entitled to have their title quieted as against the same.

Appellants contend only that a notice of levy of attachment was not sufficient under our statutes to impart constructive notice to the world of such a lien, so as to bind subsequent parties to the title; but that, under our statutes, a notice of *lis pendens* was required. *Clerf v. Montgomery*, 15 Wash. 483, 46 Pac. 1028, 48 Pac. 733, and *Johnson v. Irwin*, 16 Wash. 652, 48 Pac. 345, are relied upon as decisive. In the *Clerf* case, it was held that, where a debtor conveyed land to his wife in fraud of his creditors, and afterwards a creditor sued the husband alone, and the sheriff levied on the interest of the husband in the land by filing a copy of the writ and notice of attachment in the county auditor's office, a subsequent purchaser from the wife for value, without actual notice of the levy, was a *bona fide* purchaser without notice of any incumbrance. It will be observed that the record title was already outstanding in another than the judgment debtor. In the *Johnson* case, the same condition of title existed; the record title was already outstanding in others than the parties to the record. The *Johnson* case was an action affect-

ing the title of real estate, and there was a *lis pendens* notice filed as well as the writ and notice of attachment, and the *lis pendens* notice was also held ineffectual because of the priority of the transfer of title. Our statutes regulating "the manner of commencing actions" provide, Rem. & Bal. Code, § 243 (P. C. 81 § 173):

"In an action affecting the title to real property . . . or, whenever a writ of attachment of property shall be issued, or at any time afterwards, the plaintiff . . . may file with the auditor of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the real property in that county affected thereby."

Further provisions of this section fix the constructive effect of the *lis pendens* notice as to all subsequent parties to the record of title. Section 659, Rem. & Bal. Code (P. C. 81 § 473), regulating the manner of executing a writ of attachment, is as follows:

"The sheriff to whom the writ is directed and delivered must execute the same without delay, as follows:

"(1) Real property shall be attached by filing a copy of the writ, together with a description of the property attached, with the county auditor of the county in which the attached estate is situated."

Section 8787, Rem. & Bal. Code (P. C. 115 § 147), relating to the recording of instruments and the manner of indexing them, provides that *lis pendens* and writs of attachment shall be indexed with the "grantor" as any person against whom the notice or writ shall be placed on record. The provisions relating to the manner of executing the writ of attachment and procuring its recordation and indexing in the office of the county auditor were strictly followed in this case.

The precise question has never been before us, where a party purchased real estate, subsequent to the levy of a writ of attachment and record notice thereof only, from a party defendant in the attachment proceedings. The *Clerk* and *John-*

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son cases were followed in *Anders v. Bouska*, 61 Wash. 393, 112 Pac. 523, again a case where the outstanding record title was in the wife of the attachment defendant and the wife was a stranger to the attachment proceedings so far as any record notice went. In the last case it was said, *arguendo*:

"Had the appellant, Bouska, knowing she held the record title, made her a party defendant to the action which he commenced on a community obligation, and also to his writ of attachment, the lien which he obtained would have been indexed in her name also, thus giving constructive notice to any person who might thereafter deal with her as holder of the record title. This appellant failed to do. . . ."

Had respondent's notice of levy of writ of attachment been headed or designated on the face a "*lis pendens* notice," it would have been recorded and indexed in precisely the same place, books, and manner as it was. We are not disposed to consider it any less effective, as constructive notice to all subsequent parties dealing with the title of W. P. Littlefield, appellants' predecessor in interest against whom the notice of levy was directed, than a notice of pendency of action. The registry statutes are designed to enable persons dealing with the title at any time to follow it through the names of the holders of the record title.

"Under our system of recording, it is the grantors and grantees of land, and not the description of particular pieces of land, that can be followed by a searcher of the records." *Johnson v. Irwin, supra*, at p. 663.

It could not have been intended to require the filing and indexing in the same book of both notice of levy of attachment and notice of pendency of action in almost identical form and terms. Under the notice filed, the searchers of the record of title could at once have found that the prior grantor, Littlefield, had, at the time of his transfer, an attachment proceeding against him, and this particular land constructively seized, by a notice of record, pursuant to law. No notice technically called a *lis pendens* notice could or would have done more.

We conclude, therefore, that the statutory attachment levy and notice, from the time of filing thereof in the county auditor's office, were sufficient to impart constructive notice to any purchaser or incumbrancer of the property affected thereby. As necessarily follows, the judgment is affirmed.

MORRIS, C. J., CROW, CHADWICK, and MOUNT, JJ., concur.

[No. 12686. Department One. August 5, 1915.]

GEORGE PETERSON, *Respondent*, v. BADGER STATE LAND COMPANY, *Appellant*, JOHN A. RANKIN *et al.*,
Defendants.¹

FRAUDULENT CONVEYANCES—BETWEEN HUSBAND AND WIFE—GIFT OR PREFERENCE. Where a husband conveyed all his community property to a corporation, formed for the purpose of holding it for his wife, who was the sole stockholder, equity will look to the intent, and regard it as a gift to the wife, rather than a preference, where the value of the property is so disproportionate to the alleged claim of the wife as to constitute a badge of fraud.

SAME—TITLE OF FRAUDULENT GRANTEE. In such a case, the wife, whether in person or by the corporation, is presumed to be a trustee, holding the legal title for the community.

SAME—BURDEN AND DEGREE OF PROOF. As against creditors of the husband, the burden of establishing the good faith of his conveyance to his wife is upon the party asserting the good faith, under Rem. & Bal. Code, § 5292; and the proofs must be clear, cogent, and convincing.

FRAUDULENT CONVEYANCES—TRANSACTION BETWEEN HUSBAND AND WIFE—EVIDENCE—SUFFICIENCY. A transaction whereby a husband and wife, just prior to entry of judgment against them on a community debt in the sum of \$2,700, formed a corporation, in which the wife was the sole stockholder, and conveyed to it all their community property together with separate property of the wife, all of the estimated value of \$12,000, for the purpose, as claimed, of raising money to pay the husband's debt of about \$1,300 and to secure the wife for \$3,200 rents of her separate property collected by the husband, must be regarded as a conveyance by the husband to the wife, and the burden of establishing the good faith of the transaction, as

¹Reported in 150 Pac. 1187.

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upon a sufficient consideration, by clear, cogent, and convincing evidence, is not met, where it appears that the property, if pledged at all, was pledged only as security for the \$1,300 indebtedness, evidenced by a note which was a community debt, that the husband could give no accounting of the rents claimed to have been received, all or part of which were disbursed for living and family expenses for which the wife was primarily liable, the corporation was managed by the husband, and the wife did not testify in her own behalf; especially in view of the badge of fraud in that the value of the property transferred was disproportionate to the sum for which it was alleged to be pledged.

Appeal from a judgment of the superior court for Whatcom county, Pemberton, J., entered June 30, 1914, upon findings in favor of the plaintiff, in proceedings supplemental to execution, tried to the court. Affirmed.

S. M. Bruce, for appellant.

W. E. Barnhart (Hurlbut & Neal, of counsel), for respondent.

CHADWICK, J.—This is a proceeding supplemental to execution. The defendants were the owners of 320 acres of land in Douglas county, Washington. They traded it for property in Whatcom county, taking the difference in agreed values in a note and mortgage upon the Douglas county property for the sum of \$3,500. This they afterwards sold to the respondent. Upon the maturity of the mortgage, respondent brought an action to foreclose, making the defendants Brill parties. The note had been indorsed in blank by defendant Mr. M. M. Brill. The foreclosure proceedings went to judgment and the property was sold. It was bid in for the sum of \$1,500. A deficiency judgment was entered against the parties to the note and defendants for the sum of \$2,725.39. The decree was rendered in March, 1912. Just prior to the time that the decree was entered, Brill and his wife organized the Badger State Land Company, and transferred to that company a farm in Idaho belonging to Mrs. Brill, being her separate property, and the following pieces of community property: two tracts of land in Whatcom

county; certain city lots in the city of Seattle; lots in the city of Sand Point, Idaho; 160 acres of land in Douglas county; and 200 acres of land in the state of Wisconsin. The property so conveyed was worth, clear of all encumbrances, according to the estimates made by Mr. Brill when examined as a witness, about \$12,000.

Appellant seeks to justify the sale of the property and to exempt it from the lien of the judgment against the Brills, by asserting that, at the time the transfers were made, Mr. Brill was indebted to his brothers and sisters, the heirs of his deceased mother, in the sum of about \$1,300; that his property was incumbered up to the limit; that he had no way of getting the money unless his wife put a mortgage on her separate property; that she first refused, but finally consented to do so, and that to secure her the corporation was organized, all of the community property transferred to it, and all of the stock issued to her with the exception of one share, which was given to a son in order to perfect the organization; that the appellant corporation then made a mortgage upon the Idaho farm that had belonged to Mrs. Brill for the sum of \$1,700; that the payment of the amounts due to the estate of Brill's mother, and other expenses and some taxes and assessments against other property, absorbed the \$1,700. Mr. Brill, who was the only witness, testifies further that the land belonging to his wife had been rented for six years, four years at \$500 a year, and two years at \$600 a year; that he had collected the rents and had not accounted to his wife; that the transfer of the property of the corporation was also intended to secure his wife for these sums, aggregating \$3,200. The witness could give no account of the rent money which he claims to have collected and spent, except to say that it was spent for some good purpose, in part for living expenses and in part for the education of their son. After the organization of the corporation, defendant M. M. Brill became its manager and, so far as the testimony shows, his wife did not actively participate in its affairs unless there was some doubt about

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a deal, when she was consulted and he says that her judgment would usually prevail. No records of the corporation are offered. We understand that none were kept. It is admitted that no books of account were kept that would be intelligible. Neither Brill nor his wife nor his son drew any salary for their services. Since the corporation was organized, moneys have been collected in rents and upon land contracts, and certain taxes and expenses have been paid.

Upon this state of facts, the trial judge found that the property was transferred as security; that the only charge upon it was the amount of the mortgage put upon the Idaho land; that enough has been collected from the community property and land contracts to fully pay the charge, and that nothing is now due thereon. It was decreed that a receiver be appointed and that he proceed to sell the property, or so much of it as might be necessary to pay the judgment.

Upon appeal it is contended that the transaction was a lawful one; that the Badger State Land Company owns the property free of the lien of respondent's judgment, or, if it be not so held, that the Badger State Land Company is entitled to an accounting and to an equitable lien for the \$1,350, paid to the heirs of defendant's mother, the \$3,200 collected by defendant in rents from the separate property of Mrs. Brill, and all assessments and interest paid out for the conservation and protection of the property.

We think the court was clearly right in holding that the property, if pledged at all, was pledged only as security for the payment of the \$1,350. This, upon the theory that the property other than the farm in Idaho was, at the time of the transfer, and is now, community property.

We shall not follow counsel in their discussion of the law and the authorities sustaining the proposition that a person owing two creditors or more may prefer one to the exclusion of another, and that if a wife be a creditor the husband may prefer his wife. The debt to the estate of Mr. Brill's mother, which was evidenced by a promissory note, and all other sums

alleged to be owing, other than the \$3,200, which we shall discuss later, were community debts, to the payment of which the wife was equally bound with her husband.

A husband owing community debts cannot convey his interest in community property to his wife, or to a corporation organized for the purpose of holding it for her, she being the sole stockholder, and sustain himself by saying that she has become a separate entity, holding property as a separate estate, and that he is working for her as manager, either in her personal or corporate capacity; for, clearly, equity, which looks to the intent and not to the form of a transaction, will see in such manipulation a gift and not a preference. So will equity—and this proceeding is in the nature of an equitable proceeding—regard the value of the property transferred, and if disproportionate to the sum alleged to be owing and for which it is given in payment, it will be regarded as a badge of fraud.

When the trial judge declared that he would find that the property was conveyed as security only, an adjournment was taken upon the motion of defendants Brill and the appellant, the Badger State Land Company, for the purpose of assembling such papers, documents and receipts as might be relevant and pertinent to an accounting, it being the contention of counsel that if the property was held as security, the Badger State Land Company was entitled to a credit for all sums paid out in interest, taxes and assessments. Much testimony was received upon this theory, but we think that the testimony was improper. In so far as the relation of the defendants Brill to the property sought to be charged is concerned, it is the same as if no transfer had been made to the Badger State Land Company. The wife, whether regarded as a person or as a corporation, is presumed to be a trustee holding the legal title for the community. Rem. & Bal. Code, § 5917 (P. C. 95 § 27); *Weymouth v. Sawtelle*, 14 Wash. 32, 44 Pac. 109.

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The rule that a mortgagee is entitled to recover moneys paid out to protect the legal title might apply in ordinary cases, but it is not so where the mortgagee, in so far as third parties are concerned, is the mortgagor as well. Whether the wife could claim the whole of the property as against her husband upon the theory of gift, we are not called upon to decide. The charge of the \$3,200 rent, formerly collected from the tenants of Mrs. Brill's property, cannot be sustained as a prior charge upon the community property or passed to the credit of the appellant.

The transaction, when taken by its four corners, is a conveyance by the defendant M. M. Brill to his wife. To sustain such a transfer as upon a sufficient consideration, the proofs must be clear, cogent and convincing. The burden is upon the parties asserting the good faith of the transaction. Rem. & Bal. Code, § 5292 (P. C. 95 § 3).

Under the doctrine of the case of *Smith v. Weed*, 75 Wash. 452, 134 Pac. 1070, and *Sallaske v. Fletcher*, 73 Wash. 593, 132 Pac. 648, Ann. Cas. 1914 D. 760, 47 L. R. A. (N. S.) 320, an existing creditor is one having an "existing equity."

It seems clear to us that appellant has not sustained the burden of proof. The claim now asserted was not treated as a debt at the time the property was conveyed. A part, and possibly all, of the rents had been spent for living expenses of the family and the education of the child, for which the wife was primarily liable (Rem. & Bal. Code, § 5931 [P. C. 95 § 23]); and, granting that the community would be liable for any of the rent money used to pay taxes and interest, there was no attempt then or now to segregate and ascertain the true amount. No note was given or liability acknowledged. The wife was not a witness in her own behalf or on behalf of the appellant, and the husband, who has managed the family affairs before and after the property was conveyed to appellant, confesses his inability to account in any way or to any intelligible degree for the rent money. What-

ever claim the wife or appellant may have on account of advances to the community, they cannot avail under the statute and this record as against the claims of one having an "existing equity."

Affirmed.

MORRIS, C. J., MOUNT, MAIN, and HOLCOMB, JJ., concur.

[No. 12276. Department Two. August 11, 1915.]

C. M. WILLIAMS, *Appellant*, v. GEORGE C. HITCHCOCK *et al.*,
Respondents.¹

RECEIVERS—RECEIVER'S BOND—LIABILITY OF SURETIES—ESTOPPEL. Sureties on a receiver's bond, who intrusted the bond to the receiver for the purpose of securing the signature of the wife of one of them before filing, and who failed to examine the record and repudiate their liability for failure to secure the signature, cannot be heard to say that creditors, not parties to the suit, for whose benefit the bond was given, should have examined the record so as to know that the bond was defective; and the sureties, as the one of two innocent parties who made the injury possible, must suffer the loss.

SAME. A consent in open court to an order making permanent a temporary appointment of a receiver, upon which was based a finding, without exception, that the temporary bond was a good and sufficient bond to protect all parties concerned during the continuance of the receivership, followed by judgment accepting the bond accordingly, is a ratification of the bond and precludes the parties to the action from asserting, as against creditors, that it was invalid for want of the signature of one of the sureties.

HUSBAND AND WIFE—COMMUNITY PROPERTY—LIABILITY—SURETISHIP. A receiver's bond signed as surety by the husband as a plaintiff in an action to prevent the dissipation of the assets of a corporation, one-half of the stock of which was the community property of himself and wife, was given for the benefit of the community estate, and was therefore a community debt without execution of the bond by the wife.

COSTS—ON APPEAL. Where appellants sought a community as well as a personal judgment against a married woman, and on appeal were awarded judgment against the community only, the respondent wife is entitled to recover her costs.

¹Reported in 150 Pac. 1143.

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Cross-appeals from a judgment of the superior court for Clallam county, Ralston, J., entered March 5, 1914, upon findings in favor of the defendants, in an action on a receiver's bond, tried to the court. Affirmed on defendants' appeal and reversed on plaintiff's appeal.

Van Dyke & Thomas, for appellant.

Cochran & Plummer and *James W. Redden*, for respondents.

ELLIS, J.—The plaintiff brought this action to recover from Hitchcock, as principal, and Peter and Thorp and the marital communities consisting of Peter and wife and Thorp and wife, as sureties, on a receiver's bond. The circumstances leading up to the receivership are as follows:

The defendants Peter and Thorp, prior to 1901, were partners engaged in an insurance, real estate and law business at Ballard. In May, 1901, they took one Jasperson as a third member of the partnership. He kept the books and acted as cashier. In 1905, the profits of the business having fallen off, Thorp withdrew from the firm, and Peter and Jasperson incorporated the business under the name of W. H. Peter & Company, with a capital stock of five hundred shares of a par value of one hundred dollars each. Peter owned one-half of the stock and Jasperson the other half. It appears that, sometime later, Peter and Thorp became satisfied that Jasperson, prior to the dissolution of the partnership, had appropriated a large part of the profits to his own use. Thereupon they brought an action in the superior court of King county against Jasperson and wife and certain of his relatives for an accounting. The corporation was made a party to that suit and, at the instance of Peter and Thorp, Hitchcock was appointed receiver of the corporation *pendente lite*. His bond as receiver was fixed at \$5,000. He qualified as receiver and filed a bond, which, omitting caption and justification of sureties, reads as follows:

"Know all men by these presents: That George C. Hitchcock, receiver of Peter & Co., a corporation and W. H. Peter and — Peter his wife and F. S. Thorp and Eva J. Thorp, his wife, are held and firmly bound unto the defendants and the state of Washington in the sum of Five Thousand Dollars (\$5,000) lawful money of the United States of America, to be paid to the said defendants and the state of Washington its successors and executors, administrators or assigns, for which payment well and truly to be made we bind ourselves our heirs, executors and administrators jointly severally and firmly by these presents. Sealed with our seals and dated the 28th day of February one thousand nine hundred and eight.

"The condition of the above obligation is such, that if the above bounden George C. Hitchcock as receiver of W. H. Peter & Co., a corporation shall well and faithfully perform the duties of his said office and perform all orders of the court concerning said receivership then the above obligation to be void; otherwise to remain in full force and virtue.

"In testimony whereof we have hereunto set our hands and seals this 28th day of February A. D. 1908.

"George C. Hitchcock (Seal)
"W. H. Peter (Seal)
"F. S. Thorp (Seal)
"Eva J. Thorp (Seal)"

The bond was filed February 29, 1908. On November 2, 1909, upon the final hearing in that action, the court held that the claims of Thorp and Peter against Jasperson, on account of matters arising in connection with the former partnership, were separate and distinct from the claims of Peter against Jasperson as an officer of the corporation, and therefore entered a decree dismissing Thorp as plaintiff because he had no interest in the corporation, and dismissing the claims of Peter so far as they related to the former partnership, but making the receivership permanent, and, with the consent of all the parties who had appeared in the action, adopted the original bond given by the receiver as his bond as permanent receiver.

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During the progress of the receivership, the plaintiff in this action, C. M. Williams, and Charles F. Zeigler and B. F. Carpenter obtained three separate judgments against W. H. Peter & Company, a corporation, and against its receiver. These judgments were only partially paid, when the assets of the corporation were exhausted and the court found that the receiver had made improper use of funds sufficient to have paid these judgments in full. Thereafter Williams, for himself and as assignee of the Carpenter and Zeigler judgments, having first obtained leave in the receivership proceedings, brought this action to recover on the receiver's bond.

The case was tried to the court without a jury. The court made findings in favor of the plaintiff as against all of the defendants, except Amy V. Peter and the marital community composed of W. H. Peter and Amy V. Peter, and rendered judgment against W. H. Peter individually and F. S. Thorp and Eva J. Thorp individually, and against the marital community composed of Thorp and wife. Both parties appealed.

The defendants urge a reversal on the ground that the evidence shows that, at the time the receivership bond was signed by the defendants, Jasperson, the principal defendant in the suit in which the receiver was appointed, and the attorneys for all the other defendants except the corporation, W. H. Peter & Company, were present; that it was then agreed and understood that the bond was not to be delivered or filed until Amy V. Peter had also signed it as surety; that the bond was delivered to the receiver, Hitchcock, with that understanding, and that he, without securing the signature of Amy V. Peter, filed it as his bond as receiver, without the knowledge or consent of any of these defendants.

The plaintiff in his appeal urges that the court erred in refusing to enter a judgment against the community consisting of W. H. Peter and Amy V. Peter. We shall first address ourselves to the question raised by the defendants' ap-

peal. To avoid confusion, we shall designate the parties throughout as plaintiff and defendants.

I. The authorities are practically uniform that, where one signs a bond as surety upon condition that others are to sign it also, and it is delivered without his consent and without the additional signatures, it cannot be enforced against the person who signed, if the obligee had actual or implied notice of the condition, unless the condition be subsequently dispensed with by the one who signed. 1 Brandt, Suretyship & Guaranty (3d ed.), § 450; *Seattle v. Griffith Realty & Banking Co.*, 28 Wash. 605, 68 Pac. 1036; *Seattle National Bank v. Becker*, 74 Wash. 431, 133 Pac. 613; *Young v. Smith*, 14 Wash. 565, 45 Pac. 45; *Pawling v. United States*, 4 Cranch 218.

It is also generally held that the fact that the names of other persons than of those who sign are found in the body of the bond shows *prima facie* that the contract is not complete, and is hence sufficient to put the obligee upon inquiry and charge him with notice that those who signed may have done so only on condition that the other parties named therein would also sign it, thus opening the door to extrinsic evidence of that fact. 1 Brandt, Suretyship & Guaranty (3d ed.), § 461; *Young v. Union Sav. Bank & Trust Co.*, 23 Wash. 360, 63 Pac. 247; *Sharp v. United States*, 4 Watts (Pa.) 21, 28 Am. Dec. 676, and note, p. 679.

Some of the foregoing authorities, and many others which might be cited, hold that, when a bond containing in its body names of others than the signers is delivered to the principal named therein, with the understanding that he is to secure the signatures of such others as additional sureties before delivery, the delivery to him is in escrow; that if he deliver the bond without securing the other signatures, his delivery is void as to those who actually signed as sureties on that condition, and that these can defeat all liability on the bond by proof of the facts.

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While the foregoing principles are too well established as general rules to be open to question as between the sureties and the obligee, it will be noted that they have usually been invoked against an obligee who in the nature of the case would be expected to see the bond when it was delivered, and would hence be charged with notice of its condition. It seems to us hardly consonant with justice to apply these rules to bonds given for the protection of persons not parties to the litigation at the time the bond was given, as is the case here touching the creditors of the corporation, whose rights would be left wholly unprotected because of defects in a bond which, under the circumstances, they could hardly be expected to examine until the necessity to resort to it for protection had become imminent. Peter and Thorp themselves procured the appointment of the receiver primarily for their own benefit. They and Mrs. Thorp signed the bond and delivered it to the receiver, trusting him to secure the signature of Mrs. Peter before filing it, thus making injury to someone possible. They should be the ones to suffer the consequences of the receiver's breach of their confidence rather than visit it on the heads of creditors of the corporation who reposed no such confidence. It would seem to be a case for the application of the rule that, where one of two innocent persons must suffer, he who made the injury possible should suffer it. The filing of the bond in its incomplete condition as a part of the record in the receivership proceeding is the only thing which could be held as charging the creditors with notice. But surely Peter and Thorp, who were parties to the suit when the bond was filed and at whose instance the receiver was appointed, ought, first of all, to be charged with knowledge of the record which, by their own neglect, they suffered to be made. Not having examined the record themselves and repudiated their liability, but having permitted the court to accept the bond as their bond and on its faith to put the receiver in possession of the assets of the corporation, they should not now be heard to say that

the creditors, not then parties to the suit, should have examined the record so as to know that the bond was defective.

While we have found no case exactly parallel with that here presented, the principle which we think should apply is recognized in *Richardson v. People's Nat. Bank*, 57 Ohio St. 299, 48 N. E. 1100. It was there held that, in order for a surety to escape liability on a replevin bond on the ground of conditional delivery, it is not enough to show notice of the condition in the sheriff, to whom the bond was delivered, but that the defendant in the replevin must also be shown to have had notice. The court (opinion p. 314) said:

"It is too well settled to be questioned, that a surety on a bond of any kind cannot defeat his liability thereon by showing that it was delivered in violation of agreements between himself and the principal, or any other co-maker, unknown to the party for whose benefit it was given. It will be sufficient to cite some of the numerous cases on this point: *Bigelow v. Comegys*, 5 Ohio St. 256; *Harrison v. Wilkin*, 69 N. Y. 412; *Dangler v. Baker*, 35 Ohio St. 673; *Taylor County v. King*, 73 Iowa 153; *Smith v. Peoria County*, 59 Ill. 412; *Deardorff v. Foresman*, 24 Ind. 481; *McCormick v. Bay City*, 23 Mich. 457; *State v. Peck*, 53 Maine 284. In *Bigelow v. Comegys*, the decision is placed on what is termed the settled rule, 'that where one of the two persons must suffer a loss by fraud or misconduct of a third person, he who first reposes the confidence, or commits the first oversight, must bear the loss.' "

In *Smith v. Peoria County*, 59 Ill. 412, cited by the Ohio court, the bond, like that here, contained the name of another as surety whose signature it was agreed between the surety who signed, and the principal to whom the bond was entrusted, that the principal should secure the other's signature before delivery. The principal delivered it without securing the additional signature. The court, after stating the principle that the one reposing confidence should suffer the loss, said:

"There is no actual negligence imputable to the obligee, and there is none other than the technical neglect of not as-

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certaining the extent of the actual authority of a special agent. And as we hold, the duty of so doing did not exist, in this case the obligee is not chargeable with even such neglect. We regard the case as one where the surety must run the risk of the fraud of his own agent. We deem it the duty of the signer of an instrument, under such circumstances, to see to it that the authority he has so delegated is not abused, and that it is not just nor reasonable to allow him to take advantage of its abuse to defeat his obligation."

The reasoning of the Illinois court seems to us unanswerable. But we are not required to go that far in order to sustain the liability of the sureties on the bond before us. If it is not negligence for the obligee, as a participant in the *res gestae*, to fail to examine the bond for signs of a secret agreement and then inquire, *a fortiori* a creditor not then a party to the proceedings cannot be charged with negligence for failing to so examine and inquire.

Following the general rule, we would be inclined to hold that Jasperson, who was a party to the suit when the bond was filed, should be charged with notice of its contents and put upon inquiry. There is also evidence tending to show that he had actual notice of the agreement. Jasperson, however, was not the only obligee. The bond ran to the state of Washington and was intended to protect all creditors of the corporation as well as the defendants in the original action. These creditors could hardly be expected to examine the bond, and they cannot be charged with Jasperson's negligence in failing to do so.

But there is another and a stronger reason why the defendants here cannot now question this bond. When the receivership was made permanent, the court found:

"That the gist of the action of the plaintiff W. H. Peter, as regards the relations of the said Jasperson to said corporation, is for such accounting and the appointment of a receiver of the said corporation for the purpose of collecting its assets, operating its business and the winding up of the affairs of the said corporation, if the court should so direct.

"That after the commencement of this action, to-wit, on the day of, by the consent in open court through their respective counsel of all parties to the action who have appeared herein, a receiver, to-wit, George C. Hitchcock, was appointed by this court to take charge of the affairs of said corporation pending the final hearing herein, and that said receiver thereupon qualified as such by taking the oath required by law and filing a bond as directed by the court, and that he has ever since conducted the affairs of said corporation and is still in charge of the same as such receiver. .

"That all of the parties to this action who have appeared herein do now consent in open court by their respective counsel that the appointment of said receiver be made permanent."

Among the conclusions entered on the foregoing findings is the following:

"That the bond heretofore furnished by the said George C. Hitchcock as such receiver is a good and sufficient bond and ample to protect the interests of all parties concerned during the further continuance of his receivership, and that all of the parties to this action who have appeared so agree in open court by their respective counsel."

These findings and this conclusion were not excepted to so far as the record shows, and no appeal was taken from the decree founded thereon. The decree itself recites:

"That the said George C. Hitchcock is a proper and suitable person to act as a permanent receiver of said corporation under the further orders and directions of the court, and that he is hereby appointed such receiver and that his bond heretofore given as temporary receiver be and the same is hereby regarded and accepted by the court as his bond as such receiver."

The findings and decree show that both Thorp and Peter were then present in court and represented by counsel. Whatever may be said as to their prior right to dispute liability on the bond because it was agreed when it was originally given that they should not be bound unless Mrs. Peter also sign it, they must now be held to have ratified it as their valid bond by their failure to object to the findings, conclu-

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sion and decree above quoted. Being then present and represented in the proceedings, they cannot be heard to say that they did not know that the court was acting upon and adopting this bond as a valid bond. If they did not intend to be bound by it, it was their duty then to have examined it and raised the objection which they now urge. It is true that Thorp was dismissed from that action by the same decree, on the ground that his right of action was against Jasperson alone and not against the corporation. He is, however, as conclusively charged with notice of the fact that this decree recognized as his valid obligation the bond which he had signed, as he is with notice of the further provision of the decree dismissing him from the action.

We hold that the bond is a valid obligation of Thorp and wife and W. H. Peter, who signed it. So far as the defendants' appeal is concerned, the judgment must be affirmed.

II. The plaintiff's appeal also raises but a single question, namely, that the court erred in refusing to enter a judgment against the marital community consisting of W. H. Peter and wife and in awarding Amy V. Peter judgment for her costs.

Peter and Thorp brought the action in which the receiver was appointed, to secure an accounting from Jasperson and to enforce the payment of whatever amount might be found due from him. They procured the appointment of the receiver in order to prevent the dissipation of the assets of the corporation. Peter owned one-half of the capital stock of that corporation. This was admittedly community property of himself and wife. Every benefit intended to result from that action and from the receivership would of necessity accrue to the two communities as such—Peter and wife—Thorp and wife. The giving of the receiver's bond was an essential prerequisite to consummate any of the purposes for which the receiver was appointed. The obligation which Peter assumed as surety on the receiver's bond was an

obligation incurred by him for the protection of community property and must, therefore, be held an obligation incurred on behalf of the community.

In *McDonough v. Craig*, 10 Wash. 239, 38 Pac. 1034, this court held that:

"Any liability incurred by the husband in the prosecution of any business is *prima facie* a charge against the community; and that the presumption to that effect will continue in force until it is overthrown by proof that such liability was not incurred in any business of which the community would have had the benefit, if profit had been realized therefrom."

See, also, *Oregon Imp. Co. v. Sagmeister*, 4 Wash. 710, 30 Pac. 1058, 19 L. R. A. 233; *Horton v. Donohue-Kelly Banking Co.*, 15 Wash. 399, 46 Pac. 409, 47 Pac. 435; *Shuey v. Holmes*, 22 Wash. 193, 60 Pac. 402; *Allen v. Chambers*, 22 Wash. 304, 60 Pac. 1128; *Shuey v. Adair*, 24 Wash. 378, 64 Pac. 536; *Anderson v. Harper*, 30 Wash. 378, 70 Pac. 965; *Floding v. Denholm*, 40 Wash. 463, 82 Pac. 738; *McGregor v. Johnson*, 58 Wash. 78, 107 Pac. 1049, 27 L. R. A. (N. S.) 1022; *Peacock v. Ratliff*, 62 Wash. 653, 114 Pac. 507; *Woste v. Rugge*, 68 Wash. 90, 122 Pac. 988; *Bird v. Steele*, 74 Wash. 68, 132 Pac. 724.

We hold that the plaintiff is entitled to a judgment not only against Thorp and wife and Peter personally, and against the community consisting of Thorp and wife, but also against the community consisting of Peter and wife. The court, however, committed no error in allowing Mrs. Peter her costs. Since the plaintiff undertook to hold her personally and not merely as a member of the community, she was compelled to appear and defend in order to prevent a judgment which would bind her separate estate.

The cause is remanded with direction to modify the judgment in accordance with this opinion. The plaintiff will recover his costs in this court.

MORRIS, C. J., FULLERTON, MAIN, and CROW, JJ., concur.

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[No. 12411. Department Two. August 11, 1915.]

CALHOUN, DENNY & EWING, *Respondent*, v.EDITH J. QUINLAN, *Appellant*.¹

APPEAL—RECORD—EVIDENCE—NECESSITY. Error cannot be assigned in the granting of continuances and the refusal to dismiss for want of prosecution, where the record on appeal does not show the evidence on which the continuances were granted.

APPEAL—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE. The refusal of the court to allow affidavits to be read, after having looked into the same and hearing a statement of their contents, is not prejudicial error, where there is a trial *de novo* on appeal.

APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE. The admission of immaterial evidence, in a cause tried to the court without a jury, does not entitle appellant to a new trial or a reversal where there is a trial *de novo* on appeal.

APPEAL—STATEMENT OF FACTS—SETTLEMENT—DISPUTES—ASSIGNMENT OF ERROR. Irregularity in settling the statement of facts is not a ground upon which error can be assigned; the remedy for an erroneous statement being by application for a commission to settle the truth of the matter in dispute.

JUDGMENT—SATISFACTION—REINSTATEMENT—ABORTIVE SALE—ESTOPPEL. A sale on execution to the judgment creditor of property which was exempt as a homestead, and satisfaction of the judgment thereby, does not preclude a reinstatement of the judgment, after the debtor had the sale set aside and rendered abortive in an action to remove the cloud from the title.

JUDGMENT—RES JUDICATA—ISSUES CONCLUDED. Where a judgment had been satisfied by a sale of an exempt homestead, and the debtor sued to set aside the sale, a proceeding to reinstate the judgment is not barred by a general judgment in the debtor's action quieting the debtor's title to the homestead, where the single issue presented was whether the homestead declaration was sufficient to exempt the property from the lien of the judgment; since the scope of the decree is limited to the issues presented.

APPEAL—REVIEW—FINDINGS. Findings of the trial court upon conflicting evidence will not be disturbed on appeal where the evidence does not preponderate against the findings.

Appeal from an order of the superior court for King county, Humphries, J., entered March 2, 1914, upon find-

¹Reported in 150 Pac. 1132.

ings in favor of the plaintiff, reinstating a judgment after an invalid execution sale, after a hearing before the court. Affirmed.

Robert A. Devers, for appellant.

John P. Hartman and *Arthur E. Nafe*, for respondent.

FULLERTON, J.—On June 1, 1912, the respondent, Calhoun, Denny & Ewing, a corporation, in an action brought in the superior court of King county, recovered a judgment against the appellant, Edith J. Quinlan, for the sum of one thousand dollars, and the taxable costs of the action. Thereafter a general writ of execution was issued on the judgment and levied upon certain real property of the appellant situated in Benton county. This property was afterward sold under the execution, the sale netting the sum of four hundred and seventy-five dollars, which sum was credited upon the judgment in partial satisfaction thereof. Subsequently a second writ of execution was issued on the judgment and levied upon the residence property of the judgment debtor situated in King county, during her temporary absence therefrom. This property was also sold under the writ, and was bid in by the judgment creditor for the amount remaining due upon the judgment. Due return of the sale having been made by the officer executing the writ, the sale was confirmed, and the judgment satisfied of record. After the confirmation of the sale and the receipt of the sheriff's certificate therefor, the purchaser entered upon the property, removed therefrom the appellant's effects, consisting of household furnishings and fixtures, and stored the same for her use in a public warehouse. Subsequently the appellant returned to the property and made claim to the same as a homestead, exhibiting a declaration of homestead which she had filed on the property some years before while bearing the name of a husband from whom she was subsequently divorced. The respondent thereupon re-

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turned the household fixtures and furnishings to the house, but refused to cancel the certificate of sale.

The appellant thereupon began two separate actions against the respondent, the one to quiet her title to the property against the cloud cast thereon by the execution sale, and the other for damages caused to her household effects by their removal and subsequent return. In the first of these actions she was successful, recovering a judgment against the respondent "forever restraining it from asserting any interest in or to said property." Before the second action was brought on for trial, the parties sought a settlement between themselves of their differences. As a result of the negotiations, the respondent waived its right of appeal from the judgment in the action brought to quiet title, paid fifty dollars to the appellant as attorney's fees, paid the taxable court costs of the two actions, the whole amounting to \$72.80, and the appellant dismissed her action brought to recover in damages for the removal and return of her household effects.

On November 11, 1913, the respondent moved the court, upon notice, for a reinstatement of so much of its judgment against the appellant as had been satisfied by the sale of the King county property. The motion was resisted by the appellant, but after a hearing the judgment was reinstated by the court. This appeal is from the order of reinstatement.

The appellant assigns a number of errors based upon the manner in which the proceedings to reinstate were conducted in the court below. It is complained that the court erred in granting continuances of the proceedings; that it erred in refusing to quash the proceedings for want of prosecution, on the application of the appellant; that it erred in refusing to permit the appellant to read the affidavits presented in opposition to the motion to reinstate; that it erred in admitting affidavits offered by respondent; and that it erred in signing respondent's findings of fact, conclusions of law, and

order reinstating the judgment, in the absence of the appellant and without notice to her. But we find in the record no cause to disturb the order entered for any of these reasons. Regarding the continuances, the journal entries copied into the transcript contain merely the recitals that continuances were granted. They neither show at whose instance they were granted nor the reasons which induced the court to grant them, nor do these facts appear elsewhere in the record. Manifestly, under such a record, the court cannot even presume them to have been irregular, much less such a gross abuse of discretion as to entitle the defendant therein to a judgment for want of prosecution.

With reference to the refusal of the court to permit the appellant to read affidavits, the record shows that the respondent made a "full statement to the court of the nature of his application," and,

"Thereupon Mr. Devers [counsel for appellant] offered to read all of the affidavits that had been filed, and the court said he did not care to hear further, as the substance thereof was stated, that he had looked into the same, and would decide the case upon the merits."

Here, again, we think there can be no such abuse of discretion as to require a new hearing in the court below, more especially as this court is empowered to hear the cause *de novo* on the merits, and can take into consideration in so doing the entire record.

The appellant has not made it clear to us why the error, if error it was, in admitting the affidavits offered by respondent entitles her to a new trial. Some parts of some of the several affidavits we agree were not very pertinent to the issue, but it must be an extreme case indeed where the admission of immaterial testimony in a cause tried by the court without a jury, and which is triable *de novo* in the appellate court, will entitle the opposing party to a reversal and a new trial in the court below. This, clearly, is not

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such a case. This court will, as the trial court undoubtedly did, disregard the immaterial matter and test the right to a judgment by the evidence that is competent.

The record does not bear out the claim that the findings and the order based thereon were signed without notice to the appellant. On the contrary, the transcript shows that a copy of the proposed findings and entries, together with a notice of the time when and the place where they would be presented to the court for entry, was served upon the appellant's attorney more than three days prior to the time fixed for such presentation. If the appellant was not there at the time, surely it was not the fault of the respondent.

Complaint is made, also, of the irregular manner in which the statement of facts was settled. But this is not a ground upon which to assign error on the appeal. If a dispute arises between an appellant and the trial judge as to matters occurring at the trial which it is thought proper to include in the statement of facts, this court will, on application of the party, after notice to the trial court, appoint a commission to ascertain the truth of the matter in dispute, but it will not assume, on the mere assertion of an appellant, that the facts as certified are erroneous in any particular, or that they are not all of the material facts occurring in the cause.

On the merits of the controversy, the appellant makes three principal contentions, the first of which is that the respondent, since he caused the property to be sold, bid the same in for the full amount of his debt, and allowed the judgment to be satisfied, is estopped under the rule of *caveat emptor* from now asserting that he obtained nothing by the proceeding. But while there are courts, respectable in number and ability, which maintain this doctrine, we think the better reason and the weight of authority is the other way. The judgment creditor obtained nothing and the judgment debtor lost nothing by the abortive sale. There was no actual satisfaction of the judgment, and, seemingly, the rules of justice

require that it be not held an actual satisfaction. Some of the cases sustaining the right to have the judgment reinstated are the following: *Sturdivant v. Ward*, 90 Ark. 321, 119 S. W. 247, 134 Am. St. 32; *Hollon v. Hale*, 21 Tex. Civ. App. 194, 51 S. W. 900; *Massie v. McKee* (Tex. Civ. App.), 56 S. W. 119; *Smith v. Reed*, 52 Cal. 345; *Mehrhoff v. Diefenbacher*, 4 Ind. App. 447, 31 N. E. 41; *Scherr v. Himmelmann*, 53 Cal. 312; *Bressler v. Martin*, 133 Ill. 278, 24 N. E. 518; *Evans & Co. v. Holt & Hart*, 63 Tenn. 389; *Farmer v. Sasseen*, 63 Iowa 110, 18 N. W. 714.

The second contention is that the right to have the satisfaction set aside is barred by the decree in the case brought to quiet title in the appellant to the property sold. Unquestionably that decree determines that the property in King county attempted to be sold cannot be legally sold under a general execution issued on the judgment, but the question whether the judgment was satisfied by the sale was not in issue and was not determined in the proceeding. While the language of the decree, a part of which we have before quoted, was somewhat general, the case was tried upon an agreed statement of facts in which the single question presented was whether the homestead declaration filed thereon by the appellant was sufficient to vest the property with the character of a homestead; it being agreed that, if the declaration was thus sufficient, the sale thereof under the general execution was invalid. The decree is limited in its scope by the facts in issue, and general statements therein will not be allowed to extend it beyond such issues.

The third contention is that all differences between the parties—including any further claim on the judgment in suit—were settled by the agreement under which the action of damages was dismissed. The agreement was oral, and, as is not uncommon in such cases, there is a wide difference of opinion between the parties who negotiated it as to the matters intended to be included within it. It is needless, however,

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to review the evidence on the question. It is sufficient to say that its perusal fails to convince us that it preponderates against the conclusion of the trial judge.

The judgment is affirmed.

MORRIS, C. J., CROW, ELLIS, and MAIN, JJ., concur.

[No. 12415. Department Two. August 11, 1915.]

MILDRED VEYSEY, *Appellant*, v. CHARLES VEYSEY *et al.*,
Respondents.¹

EXECUTORS AND ADMINISTRATORS—DECREE OF DISTRIBUTION—VACATION—FRAUD—EVIDENCE—SUFFICIENCY. The settlement of an estate by a decree entered after citation and notice by publication, when the minor, her guardian, and her attorney were present in court, will not be set aside on allegations of fraud and collusion with her attorney, where there was no evidence of the collusion, evidence that the decree was entered in accordance with a prior settlement was circumstantial, and the burden of establishing the fraud was not sustained.

EXECUTORS AND ADMINISTRATORS — SALES — FRAUD OF EXECUTOR—EVIDENCE—SUFFICIENCY. The fact that an executor's sale of one-half of the stock in a corporation was made for \$2,900 and that a few months thereafter the purchaser resold the stock for \$3,520 to the executor, who owned the other half, is not sufficient alone to establish fraud; it appearing that the purchaser was an entire stranger at the time of the sale, which was made in good faith without any arrangement for the executor's benefit.

JURY—JURY TRIAL—RIGHT TO. An action in its essence for a discovery and accounting is of equitable cognizance and triable to the court without a jury.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered March 21, 1914, in favor of the defendants, in an action for an accounting, tried to the court. Affirmed.

Van Nuys & Hunter and *Frank Beam*, for appellant.

W. H. Abel, for respondents.

¹Reported in 151 Pac. 39.

ELLIS, J.—This action was commenced on October 31, 1913, by the plaintiff, as sole heir of Marion Veysey, deceased, against the defendant Charles Veysey, as administrator of the partnership estate of Charles Veysey and Marion Veysey, and as executor of the will of Marion Veysey, for an accounting as to both estates. The plaintiff also sought a personal judgment against the community consisting of the defendants Charles Veysey and Nettie Veysey, his wife. By ancillary proceedings, certain lands in Chehalis county belonging to the defendants were attached. After a lengthy trial in which voluminous evidence on both sides was taken, the trial court entered a judgment dismissing the action and vacating the writ of attachment. The court made no separate findings and conclusions of law. A motion for a new trial was denied. The plaintiff appeals.

We shall not attempt to set out even in substance the lengthy complaint with its numerous and sweeping charges of fraud, nor shall we attempt any detailed discussion of the evidence, since to do either would extend this opinion to interminable length without profit to any one.

For some years prior to the death of Marion Veysey, he and the respondent Charles Veysey were engaged in a mercantile business in Montesano, Washington, which was incorporated as Veysey Brothers, Inc., with a capital stock of \$11,500, divided into one hundred and fifteen shares of a par value of one hundred dollars each. The two brothers each owned one-half of the stock. They also conducted a partnership mercantile business at Elma, Washington. Marion Veysey died on October 13, 1905, in Chehalis county, Washington, leaving as his sole heir the appellant, Mildred Veysey, then about fourteen or fifteen years of age. His estate consisted of individual and partnership property. The individual property comprised his fifty-seven and one-half shares of the capital stock of Veysey Brothers, Inc., and a few personal effects of very little value. The partnership estate consisted of a one-half interest in the mercantile busi-

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ness at Elma, certain book accounts, notes, mortgages, and certain real estate.

On January 8, 1906, one J. M. Stamper was appointed special administrator of the estate. He served until March 19, 1906, when he was discharged. On January 26, 1906, Charles Veysey, the respondent herein, was appointed sole administrator of the partnership estate. Shortly before his death, Marion Veysey uttered a nuncupative will, making the respondent Charles Veysey his executor. On its probate, the court held this will valid as to the personalty, but not as to the real estate, and on March 12, 1906, appointed Charles Veysey executor of the will. He qualified as such and continued to act as executor under the will and as administrator of the partnership estate until January 7, 1907, when by decree of the court the property belonging to the estate was distributed and the administrator and executor was discharged. The appellant attacks this decree of distribution as being procured through fraud and without any accounting on the part of the executor and administrator as to the estate which came into his hands, and upon the further ground that it was procured through collusion of the respondent and his attorney with the attorney for the appellant and her guardian. This, aside from one other charge of fraudulent action on the respondent's part, is all that we deem it necessary to discuss in this opinion, since, if this decree of distribution was entered without fraud, it is clearly as binding as the judgment of a court having jurisdiction in any other case.

As leading up to this decree, the evidence shows that the executor and administrator filed his final report on December 24, 1906, showing the assets of the estate, consisting of a balance of \$1,472.82, cash on hand; that the partnership estate consisted of seven pieces of real estate, three at Elma and four at Montesano, Washington; \$246.75 balance due the partnership on certain machine contracts; approximately \$3,300 in notes payable to the partnership, and open ac-

counts amounting to \$4,611.91; that all liabilities of the estate had been paid, except \$1,891.73 owed by the partnership. In this report the respondent prayed that the estates, both individual and partnership, be closed and the executor and administrator be discharged.

On January 7, 1907, the appellant and one George L. Thompson, her stepfather, who had been appointed her guardian, also petitioned the court to set apart to her in distribution as her share of the estate \$4,000 in cash and all notes, mortgages, accounts and conditional sale contracts and choses in action belonging to the estate; that there be distributed to the respondent Charles Veysey all of the real estate belonging to Marion Veysey and to the partnership estate of Veysey Brothers; that the minor be charged with the expenses of administration upon the estate, except the compensation of Charles Veysey as executor and administrator, which he had agreed to waive, and that the minor also be charged with all unpaid claims against the partnership estate, excepting a debt due from the partnership to Veysey Brothers, Inc., amounting to \$1,254.20, which Charles Veysey had agreed to pay. This petition was signed and verified both by the minor, Mildred Veysey, and by George L. Thompson, her guardian, on January 7, 1907.

Pursuant to the administrator's final report and this petition of the minor and her guardian, the court, on January 7, 1907, entered its decree, in which it was ordered that Charles Veysey pay to Mildred Veysey \$4,000 in cash and transfer to her all the notes, mortgages, conditional sale contracts and book accounts belonging to the Veysey Brothers; that out of the \$4,000, Mildred Veysey pay all the costs of administration, including \$1,254.21 paid by Charles Veysey for the expenses of the special administrator, and that all the real estate belonging to the partnership be distributed to Charles Veysey. By that decree, the estate, both individual and partnership, was declared settled and the executor and administrator was discharged. The record shows that this

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decree was entered after citation by publication and when both the minor and her guardian and also their attorney were present in court. Both the appellant and her guardian testified that they were induced to sign their petition for settlement through misrepresentations of their attorney as to what she would receive by such a settlement. The attorney is now dead. His version of the transaction could not be had. The respondent's testimony, however, is circumstantial and shows that the whole matter of settlement was talked over by himself, his attorney, Thompson the guardian, and his attorney in December, 1906, and that the final decree embraced the terms of settlement as agreed upon at that time. Also that Thompson and his attorney came to the store in Montesano, checked over the accounts, notes and mortgages in question and took the ledger containing the accounts away with them. We are convinced from a most careful consideration of all the evidence that the charges of fraud in procuring this settlement are wholly unfounded. We find no evidence whatever of any collusion between the respondent and the attorney for the minor and her guardian.

It is also charged that the respondent never complied with the decree. Thompson, the guardian, testified that he received on this settlement only \$1,411.78. He identified, however, his signature to receipts and his indorsements as guardian on checks given by respondent aggregating over \$6,800, which the evidence indicates must have passed in connection with this transaction. The respondent accounted for each of these checks and receipts. As we read it, the evidence strongly preponderates in favor of the view that the guardian did receive everything to which he was entitled under the decree.

The appellant also claims that the respondent withheld from the operation of this decree the lot and store building in Montesano in which was conducted the mercantile business of Veysey Brothers, Inc. The evidence, however, shows that this claim was first made shortly after the decree of distribu-

tion and that the respondent then brought a suit to quiet title against the minor and her guardian, which action resulted in a decree finding that the property in question was his individual property and quieting the title in him. The appellant and her guardian in the present action testified that they knew nothing of that suit until after final decree, and it is asserted that the decree was procured through collusion between their attorney and the respondent. The record in that case, however, shows proof of personal service on the appellant and her guardian. Moreover, her guardian identified his signature to the answer and to the verification thereto in that case. There is nothing in the record which we consider capable of raising even a suspicion of collusion between the deceased attorney for the minor and her guardian and the respondent, Charles Veysey, in that suit. In any event, the evidence in this case touching the title to this lot is, we think, convincing that Charles Veysey actually owned the property in question and that the decedent, Marion Veysey, never had any interest therein, except an option to acquire a one-half interest by payment of one-half the purchase price thereof, which option he never exercised.

While there are many other charges of irregularity and fraud and many transactions in connection with the estate the good faith of which is impugned, none of them is sufficiently definite or supported by sufficient evidence to merit consideration, save one. The respondent, while acting as administrator of the estate, procured an order to sell, and sold, the fifty-seven and one-half shares of the capital stock of Veysey Brothers, Inc. This stock was sold to one Hanna for \$2,900. A few months subsequently, the respondent himself purchased this stock from Hanna for \$3,520. It is charged that the sale to Hanna was a private sale, whereas a public sale was ordered. The charge is unfounded. The record in the probate proceeding shows that the sale was made at public auction after notice, as required by order of court. It is also asserted that this was in fact a sale to Charles Veysey

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himself; that Hanna acted merely as a dummy in the transaction, and that the sale was therefore fraudulent in law. A careful consideration of the evidence in this connection convinces us that this charge is also unfounded. The evidence shows that the respondent was wholly unacquainted with Hanna, and there is nothing whatever to indicate that the sale was collusive. The respondent testified, in substance, that he would have been glad to purchase the stock but knew that it would be illegal for him to do so, either directly or indirectly; that the sale was made in perfect good faith and without any arrangement, either direct or indirect, with Hanna that it should be for the respondent's benefit. The only circumstance tending to cast any suspicion whatever upon the good faith of this transaction is the fact that the respondent afterwards purchased the stock from Hanna at a considerable advance. That circumstance alone is wholly insufficient to establish the fraud charged.

Some point is made of the fact that the appellant's request for a trial by jury was denied. The complaint is in its essence a bill for discovery and accounting. The action is therefore one of equitable cognizance, properly triable to the court.

We have given this case most careful consideration. Practically all of the questions involved are questions of fact. The law involved is elementary. The burden was upon the appellant to establish her charges of fraud by a preponderance of the evidence. She has failed to sustain this burden. The judgment is affirmed.

MORRIS, C. J., MAIN, FULLERTON, and CROW, JJ., concur.

[No. 12462. Department Two. August 11, 1915.]

E. F. MASTERSON, *Appellant*, v. UNION BANK & TRUST
COMPANY, *Intervener and Respondent*,
IRA DAVISSON, *Defendant*.¹

PAYMENT—PRESUMPTION—REMITTANCE BY MAIL—OWNERSHIP. Where a bank, upon request, delivered money in the mails by registered letter, addressed to the consignee, in the absence of any agreement or custom to that effect, there is no presumption that the carrier is the consignee's agent, but the presumption is that the money belongs to the sender until actually delivered to the consignee; the transaction being more in the nature of a payment than a consignment of goods and the creditor having the right to payment in person.

REPLEVIN—OWNERSHIP OF PROPERTY—DEFENSES—TITLE IN THIRD PERSON—ESTOPPEL. Where a bank, upon request, delivered money in the mails by registered letter, addressed to the consignee, and it was stolen in transit and the bank sued to recover it, the defense of ownership by the consignee is unavailable, where the consignee had appeared as a witness on behalf of the bank and estopped himself from claiming title to the money.

REPLEVIN—OWNERSHIP—EVIDENCE—SUFFICIENCY. Evidence that \$2,500 was stolen from a registered mail package, intrusted to a Japanese, who made various purchases and was about to depart for Japan under suspicious circumstances, held sufficient to establish, in an action of replevin, that he stole the package, where his explanation of the possession of so much money was improbable.

SAME. In an action of replevin, evidence that the purchaser of articles stole, from the United States mails, money of certain denominations a few days before the purchases, and paid therefor with money of the same denominations, sufficiently establishes that the articles were purchased with the stolen money, in the absence of a showing that he had other money of like denominations.

SAME—OWNERSHIP—BONA FIDE PURCHASER—KNOWLEDGE OF THEFT. An attorney, securing from his client, charged with the theft of money, a bill of sale of articles recently purchased, cannot claim that he had no knowledge that the articles were purchased with the stolen money, where the bill of sale was made three days after the arrest of the client, and after attending the preliminary hearing at which the client was bound over to await the action of the grand jury.

¹Reported in 150 Pac. 1126.

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Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered March 30, 1914, upon findings in favor of the intervener, in an action of replevin, tried to the court. Affirmed.

Boyle, Brockway & Boyle, for appellant.

B. S. Grosscup and *W. C. Morrow*, for intervener and respondent.

FULLERTON, J.—Sometime in the early weeks of January 1913, one M. P. Stoppel, of Garrison, Montana, ordered his banker at Deer Lodge, in the same state, to forward to him at Garrison \$2,500 in money. The Deer Lodge bank forwarded the order to the Union Bank & Trust Company of Helena, Montana, with the request that it comply therewith. On January 14, 1913, the Helena bank selected bills of the denominations of five dollars, ten dollars and twenty dollars up to the amount required, bound them into a package suitable for mailing, and deposited the package in the post office at Helena to be forwarded to Stoppel at Garrison as registered mail. The package did not reach Stoppel. The post office inspectors traced it from the Helena office to Garrison, where it was deposited by a railway mail clerk in a mail pouch which was delivered to one Toda, a Japanese, an employee of the railway company at Garrison, a part of whose duty it was to carry the mail pouches from the depot to the post office. The pouch was carried by Toda to the post office in the customary manner, but when opened by the postmaster was found not to contain the package, and subsequent search for it, which was thereupon instituted, failed to discover its whereabouts.

Toda, on the day following the loss of the package, obtained a leave of absence from his employer and started on a visit to Japan. When he reached Seattle, some two days later, he purchased a gold filled watch with chain and charm, a diamond ring, a motorcycle, a draft on one banking house

in Japan in the amount of eighteen hundred yen, a like draft on another banking house in the amount of two thousand yen, passage on a steamer from Seattle (or Tacoma) to a port in Japan, and sundry small articles, the total of his purchases amounting to a sum between \$2,400 and \$2,500, the principal part of which he paid in bills of the denominations of five dollars, ten dollars, and twenty dollars. Shortly thereafter, when about to board the vessel on which he had procured passage to Japan, Toda was arrested by a United States marshal, on a warrant issued by a United States Commissioner sitting at Tacoma, charging him with the theft of the package of money lost at Garrison. When arrested, the articles before mentioned were taken from his possession by the officer arresting him. Toda employed one E. F. Masterson, an attorney of Tacoma, to conduct his defense on the charge of larceny preferred against him, and in payment of his fee, gave Masterson a bill of sale of the watch with the chain and charm, the ring, the motorcycle, and the bank draft for the amount of eighteen hundred yen. The marshal refused to deliver the articles over on the demand of Masterson, retaining them, as he stated, for evidentiary purposes and to protect the true owner. Toda was afterwards brought to trial in the state of Montana for the larceny of the money, in which trial the articles were used as evidence. At the conclusion of the trial, they were returned to the officer, and by him brought back to Tacoma, whereupon Masterson began the present action to recover them, or their value in case delivery could not be had. The action was instituted against the officer as the sole defendant. Subsequently, the Union Bank & Trust Company asked and obtained leave to intervene in the action, and set up title to the property in itself by reason of its ownership of the stolen money. The officer thereupon deposited the articles with the clerk of the court and filed an answer disclaiming interest therein. The action was then tried out on the issues as to ownership, between the Union

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Bank & Trust Company and Masterson, resulting in a judgment in favor of the bank. Masterson appeals.

It is the appellant's first contention that the record fails to show that the intervener, the Union Bank & Trust Company, was the owner of the money taken from the mail pouch at Garrison, or is otherwise entitled to the articles purchased therewith. He argues that the depositing of the package containing the money in the mails, addressed to Stoppel, was a delivery of the money to Stoppel, vesting ownership in the money in him, and that he alone, in the absence of a reassignment to the bank, which the record fails to show, can claim the money or the proceeds thereof from the person in possession.

The record shows nothing more as to the contract between the parties which gave rise to the forwarding of the money than the facts heretofore recited; namely, that Stoppel ordered the money from his own banker, and that that banker requested another to forward it, which it did do in the manner indicated. It is undoubtedly a general rule that, when goods are ordered by a purchaser from a dealer, without stipulation as to the manner of their delivery, a delivery of the goods by a dealer to a common carrier for account of the purchaser is a delivery to the purchaser, subject only to the right in the dealer of stoppage *in transitu*. But it seems to us that the present case is not a case of the ordering of goods to be delivered in the ordinary way, but is more in the nature of the payment of an obligation. If it be the fact that the bank receiving the original order from Stoppel was indebted to Stoppel, or obligated in some way to him for the payment of the money demanded, it would not be a compliance with its obligation for it to deposit in the United States mails a package containing the money addressed to Stoppel. A creditor has a right to payment in person, or through his duly authorized agent, and the debtor cannot select an agency for him, even though the agency selected be the United States mails or other public

carrier. So here, contrary to the presumption that might arise in the sale of goods, the delivery in the mails of a package containing the money, addressed to the consignee, in the absence of some showing of an agreement or custom to that effect, does not raise a presumption that the carrier was the consignee's agent. The presumption is the other way; the money is presumed to belong to the sender until actually received by the person to whom it is sent. *Buell v. Chapin*, 99 Mass. 594, 97 Am. Dec. 58; *Dexter Horton Nat. Bank of Seattle v. Hawkins*, 193 Fed. 363.

But the conclusion may rest on another ground. The only person aside from the bank who can claim ownership of the money or the proceeds thereof is Stoppel, since he was the assignee or addressee of the package containing the money, and the person for whom it was intended. The record shows not only that he knew that the bank was claiming ownership of the money subsequent to its deposit in the mails and that its claim to the property here in suit was based on title in itself, but that he appeared in the action as a witness for the bank and testified to facts in aid of a recovery by the bank. Clearly, under these circumstances, he is estopped from claiming title to the property as against Toda, or Toda's assignee, if not as against the bank itself. Since the claim of ownership rests between the bank and Stoppel, Stoppel can by his acts waive his claim as to third persons, and we are clear that he has done so in this instance. *Murne v. Schwabacher Bros. & Co.*, 2 Wash. Terr. 191, 3 Pac. 270; *Douthitt v. MacCulsky*, 11 Wash. 601, 40 Pac. 186; *Shoemaker v. Finlayson*, 22 Wash. 12, 60 Pac. 50; *American Bonding Co. v. Loeb*, 47 Wash. 447, 92 Pac. 282.

The next contention is that the evidence is insufficient to justify the conclusion that the package containing the money was taken by Toda. But without entering upon an extended review of the evidence, we think it preponderates in favor of the conclusion of the trial court. It hardly seems probable that Toda acquired this considerable sum of money, as he

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testifies he did, by savings from his wages, when his manner of living is considered, and the very considerable sums he admittedly expended for other purposes from his savings are deducted. And the improbability is increased, we think, when it is remembered that the sum is said to be the result of accumulations extending over a period of years, which were kept hidden under the floor of a sleeping room, in the chimney of a bunk car, and in other out of the way places. It is true that instances of accumulations in this manner are not altogether unusual, but it is the habit of a person of a different sort of intellect than this person is shown by the record to possess. This Japanese was bright and intelligent with a good knowledge of American institutions and American methods of doing business, and had no distrust of its financial institutions. The probability is not great that a man of his character would keep money in this way.

It is next contended that there is no evidence tending to show that the articles for which this action was brought to recover were purchased with the stolen money, but on this question also we think the evidence ample. It was shown that the purchaser of the articles stole from the United States mails, some three days before he made the purchases, currency of certain denominations, that the articles for the greater part were paid for in currency of similar denominations, and that the purchaser was not shown to have had other money of like denominations. Seemingly there is here almost a direct tracing of the money stolen into the articles sought to be recovered. But the plaintiff was not required to prove the fact beyond a reasonable doubt. It is enough if the evidence preponderated in its favor, and we are clear that the evidence did so preponderate.

The person selling the watch and chain testified, however, that he "believed there was a gold piece with the currency" he received in payment for these particular items. The appellant argues from this there can be no recovery of these items because it is not shown that Toda stole any gold.

But it appears that Toda had purchased the motorcycle, and perhaps other of the articles, before he purchased the watch and chain, and it is certain that if he paid for these in bills of the denominations mentioned, he received something in change. It is more probable, we think, that he so received the gold piece mentioned than that it was money acquired by him from another source.

Finally, it is said that the evidence failed to show that the appellant, when he received the bill of sale of the articles mentioned, had knowledge that it was property purchased with stolen funds, and that the trial court erred in finding that he did have such knowledge. But the evidence shows that he received the bill of sale some three days after Toda's arrest and after he had attended, as Toda's counsel, the preliminary hearing before the United States commissioner, at which Toda was bound over to await the action of the grand jury. Our conclusion is that the finding is supported by the evidence.

The judgment is affirmed.

MORRIS, C. J., CROW, ELLIS, and MAIN, JJ., concur.

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Syllabus.

[No. 12548. Department One. August 11, 1915.]

N. L. TOOKER *et al.*, Respondents, v. WILLIAM D. PERKINS
et al., Appellants.¹

APPEAL—REVIEW—VERDICT. Where there is conflict in the evidence, the facts are for the jury, and unless physically impossible or naturally improbable so that reasonable minds could not differ thereon, the supreme court accepts as conclusive the fact necessarily resolved by the jury in respondent's favor.

MUNICIPAL CORPORATIONS—STREETS—NEGLIGENT DRIVING—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action for injuries sustained by pedestrians struck by an automobile, in the nighttime, where plaintiffs stopped and looked in all directions before starting to cross a street in the middle of the block and saw no car approaching and were struck by a car carrying insufficient lights, which it was impossible to see any distance, and the plaintiffs did not see the car until about six feet away, it is proper to refuse an instruction that plaintiffs were guilty of contributory negligence in crossing the street in the middle of the block in case the view was unobstructed and the car carried ordinary lights; since the instruction was not based upon the evidence.

SAME. In such an action, evidence to the effect that, when plaintiff first saw the car, it veered to the east and he assumed it would pass to the east of him, when it suddenly veered to the west, does not warrant an instruction based on the fact that plaintiff assumed that the car would pass down an east driveway contrary to the law of the road, since there was no evidence of any such assumption on his part.

SAME—STREETS—NEGLIGENT USE—CONTRIBUTORY NEGLIGENCE—ACTS IN EMERGENCY—QUESTION FOR JURY. Where a rapidly approaching automobile, but a few feet distant, first veered to the east, and then suddenly veered to the west, striking the plaintiffs, head on, before they could move, the question of their contributory negligence in endeavoring to get out of the way in the emergency is for the jury.

SAME—STREETS—NEGLIGENT USE—FAILURE TO SOUND HORN—QUESTION FOR JURY. In an action for personal injuries in running down pedestrians on a dark night, with an automobile going 25 miles an hour, having no headlights as required by ordinance, whether defendant was negligent in not sounding a horn in the middle of a dark block, is a question for the jury, the ordinance requiring the

¹Reported in 150 Pac. 1138.

sounding of warning where danger exists to any person in or upon the street.

SAME—STREETS—NEGLIGENT USE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action for personal injuries sustained by pedestrians, struck by an automobile, an instruction that the plaintiffs were guilty of contributory negligence in crossing the street in the middle of the block, in case they could with reasonable diligence have discovered the approaching car with its side lights burning, is properly refused where it ignored evidence that the car was not sufficiently lighted and could not have been seen at that distance, and that plaintiffs looked but could not see the car until the car, approaching at twenty or twenty-five miles an hour, was within ten or fifteen feet from them; especially where other instructions stated the law as favorably to the appellants as it could be.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$4,000, reduced by the trial court to \$3,000, for severe cuts, bruises, and personal injuries sustained by a man and wife, causing much pain and suffering and permanent injuries to the wife's back, knee, and nervous system, when they were struck by an automobile going twenty or twenty-five miles an hour, and thrown and dragged thirty or forty feet, although seemingly large, will not be set aside on appeal as excessive where it cannot be said to be the result of passion or prejudice or any illegal influence.

Appeal from a judgment of the superior court for King county, Albertson, J., entered July 3, 1914, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by pedestrians struck by an automobile. Affirmed.

Kerr & McCord, for appellants.

Walter S. Fulton and Irving T. Cole, for respondents.

HOLCOMB, J.—Respondents brought their action jointly against appellants, for damages for personal injuries in the sum of \$4,700, upon allegations of negligence in operating an automobile owned and operated by appellants. There was a verdict for respondents for \$4,000, which was reduced to \$3,000 by the trial court on motion for new trial. Respondents' recovery was based upon the presentation by them, for the consideration of the court and jury, of substantially the following facts: At about 6 o'clock p. m., on November 23,

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1918, respondents alighted from a street car on Broadway at East Thomas street, Seattle, and proceeded westerly on the north side of East Thomas street to the east side of Harvard avenue; then, instead of crossing Harvard avenue at its intersection with East Thomas street, they turned north and proceeded along the east side of Harvard avenue a distance of about 120 feet to a point about opposite, or a little north of, the north point or apex of a triangular parking strip which was situated in the middle of Harvard avenue, commencing at its intersection with East Thomas street and extending northward about 108 feet. The parking strip is about 39 feet wide at its south end, which is the north line of East Thomas street at its intersection with Harvard avenue. There is a driveway on each side of the parking strip about 18 feet wide. South-bound traffic passes down the west driveway, and north-bound goes up the east driveway. The width of Harvard avenue is about 75 feet, including the parking strip in its center, which, as said, runs to a point about 108 feet to the north. One block north of East Thomas street is East Harrison street, running parallel with East Thomas, the distance between the two being about 277 or 320 feet, there being some discrepancy in the testimony.

At about the same time that respondents undertook to cross Harvard avenue as described, appellants' automobile was being driven south along Harvard avenue between East Harrison and East Thomas streets. The automobile was in charge of one Nelson, appellants' chauffeur, who had had seven years' experience, and there were in it at the time, besides Nelson, Mrs. Perkins, one of appellants, her son, and three other persons. A little north of the apex of the parking strip, on the west side of Harvard avenue, is the Roycroft apartment building. In front of this building, at the time in question, there was an automobile standing motionless. The night was very dark and it had been raining but, according to respondents' testimony, was not raining at the time, and they did not put up their umbrella, but carried it closed.

They proceeded across Harvard avenue somewhat diagonally, bearing slightly to the north. When within about 10 feet of the west curb of Harvard and 12 or 15 feet north of the apex of the parking, they, for the first time, observed the large automobile (appellants') bearing down upon them from the north, at a distance from them of only six or eight feet, and at a speed of about 25 miles an hour, and without any warning to them other than the "rumbling sound" of the car. According to their testimony, respondents, when about to step off the east curb of the street to cross the street, stopped and looked both ways up and down Harvard avenue, for any approaching automobile, but saw none whatever except the one standing in front of the Roycroft. Mrs. Tooker said she remembered distinctly looking "past her husband, who was on her right, when they stopped, as she was always scared to death of automobiles and always looked both ways." When they first saw appellants' automobile it had just swerved to the east around the standing automobile in front of the Roycroft. It then suddenly swerved to the right again. Mr. Tooker was nearest the car on the right side, his wife holding his left arm. The oncoming car being so nearly upon them, he tried to swing her to the left and forward in an effort to thrust her away from the car. At the same instant the car struck them both. The chauffeur sat on the right side of the machine, and respondents were struck by the front of the machine. Mr. Tooker was rolled or dragged on the pavement a distance of 30 or 40 feet, and his wife was knocked prone to the street and rendered insensible.

The owner of the machine which was standing in front of the Roycroft was sitting just inside the entrance to the Roycroft, beside the front window, and heard a loud crash which caused him to think his machine had been run into by another, and he immediately went out into the street. He saw the automobile of appellants. He saw that its headlights were not lighted and that small oil side lamps were lighted

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but threw no light out to any distance in front. He said these oil lamps were smeared with smoke, dirt, and soot so that the lights would not, and did not, extend outside the glass fronts of the lamps; that they could not be seen; that they "were rotten, no lights at all;" "if standing 10 or 15 feet away and that car was going any speed at all and you instantly looked up, you could not see them [the side lights]." He had had nineteen years' experience in driving automobiles. He had driven cars for the purpose of testing their speed, their mechanism, and their power of stopping and starting, and had driven Packard machines like appellants'. He testified that if this machine had been running at a speed of four to six miles an hour, it could have been stopped almost instantly, within two feet; if it had been running at a speed of not to exceed six miles an hour, there would have been no noise from a collision with a person; if running at the speed of about six miles an hour, it would have been utterly impossible to have knocked one of respondents insensible and carried the other along crosswise in front of the car a distance of 30 or 40 feet. He also found one of the headlights battered by an impact with some object, and driven back against the radiator. He testified that, in his opinion, the car must have been running at not less than twenty miles an hour. There was also other automobile expert testimony that a car, knocking down respondents and throwing one of them across the front of the machine, and carrying one of them a distance of 30 or 35 feet before the car was brought to a standstill, the operator having done everything that a competent operator of a car could do, must have been running at least 30 to 35 miles an hour. If running six miles an hour, it could have been stopped within two feet; if at 12 miles an hour, in from two to five feet. If running at 12 miles an hour, it could not have gone 35 to 40 feet before being stopped by a competent operator, doing all he could. If running four to six miles an hour when coming

in collision with two persons, it would make no noise, but its impact would be more like a shove than a knock.

An ordinance of the city of Seattle, No. 30,906, was pleaded and introduced in evidence, which provides, among other things, that

"No person shall operate or use any automobile . . . upon the streets, avenues, alleys, parkways, or other public places in the city of Seattle, without having attached thereto a bell, gong, horn, or other signal device in good working order capable of producing an abrupt sound sufficiently loud to be heard above the noise of traffic, and to serve as an adequate warning of the approach of such automobile and of the danger to any person caused thereby. No person using or operating any automobile . . . shall fail to sound such signal device as a warning when danger exists to any person in or upon any of the streets, avenues, alleys, parkways, or other public places by reason of the approach of such automobile," etc.

There was also an ordinance, No. 30,263, pleaded and introduced in evidence, providing as follows:

"It shall be unlawful for any person to ride, drive, or propel any automobile . . . over or across any street, park, drive or other public place in the city at an excessive or unreasonable rate of speed or at such rate of speed as will endanger the life, limb, or property of pedestrians using such streets or other public places and in no event at a rate of speed greater than twenty miles an hour."

There was also an ordinance, No. 28,563, pleaded and introduced in evidence, which provides, among other things, that automobiles, etc., operated on the streets between the hours of sunset and sunrise shall have fastened to the front thereof at least two white lights of sufficient candle power to be visible for a distance of at least one hundred feet in front of such automobile or other motor vehicle.

Respondents' testimony showed that, when the automobile struck them, Mr. Tooker, being nearest it, tried to swing Mrs. Tooker forward and to the left in an effort to release her and get her away from the car. At the same instant, the

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car struck them both. Mr. Tooker was thrown flat on his stomach on the ground, and then rolled and bumped along by the car for about 45 feet before it was brought to a stop. He at once picked himself up and rushed back to his wife, whom he found about 35 feet from the rear end of the car, lying unconscious on the ground, with her head badly cut, blood flowing from the wound, and her face, hair, hat, and part of her clothing covered with blood. Mrs. Tooker was carried in an unconscious condition to her apartments in the Roycroft, and remained in such condition until after a physician had arrived and had taken six or seven stitches in the cut on the left brow or temple, when she partly regained consciousness for about twenty minutes, and then lapsed again into unconsciousness. She spit considerable blood the night of the accident and was confined to her bed two weeks lacking one day. The cut on her head was two and one-half to three inches long. Her left shoulder was sprained and bruised. There were bruises on the right side of her chest and a sprain of her left knee, a concussion of the brain, a blackening of the left eye, and a partial paralysis of the left eyelid and brow, due to a cutting of the nerve by a gash in her brow, continuing more or less to the date of the trial. As a result of the collision she had lost in appetite and weight, has a noticeable scar from the wound, has backaches that she never had before the accident, is in a nervous condition, and has a stiffening of the left knee, making it difficult for her to go up and down stairs or to alight from a street car. During the two weeks she was confined to her bed, she was stiff and sore all over and suffered pain. N. L. Tooker's spine, shoulders, limbs, and body were badly wrenched and bruised. He suffered great pain therefrom, and after the second day it was almost impossible for him to get up and down out of a chair. This continued for about a week. His left knee was badly bruised and skinned and did not heal for about three weeks. The bruises on his right arm remained for two weeks, and his back was black and

blue across the spine and shoulder blades for about two weeks, causing constant pain. The physician's charge for his services was \$40; the expense of a nurse was \$25; medicine and incidentals for Mrs. Tooker, \$10; a total of \$75. Mr. Tooker had clothing of the value of about \$85 destroyed by the accident, and Mrs. Tooker had clothing of the value of about \$60 destroyed. Two hundred dollars was claimed by respondents as damages for medical and surgical expenses paid out and clothing destroyed, \$500 for injuries to N. L. Tooker, and \$4,000 for injuries to Mrs. Tooker. The appellants denied the allegations of negligence contained in respondents' complaint, and affirmatively alleged contributory negligence.

Much of the argument of appellants assumes that certain facts tending to show contributory negligence on the part of respondents were undisputed. Since the verdict of the jury, we must consider the facts resolved as presented by the respondents. Where there is conflict in the evidence, the facts are for the jury and, unless physically impossible or naturally improbable so that reasonable minds could not differ thereon, we are compelled to accept as conclusive all those facts which must necessarily have been resolved by the jury in respondents' favor.

It is contended that the court erred in refusing to instruct the jury that, when the plaintiffs attempted to cross Harvard avenue near the center of the block in the nighttime, when the rain was falling, if the jury should find that the view in the direction from which the car was coming was unobstructed, and that the machine carried the ordinary side lights, and that such lights were lighted, plaintiffs themselves were guilty of such contributory negligence as would prevent a recovery. In support of this contention they cite *Harder v. Matthews*, 67 Wash. 487, 121 Pac. 983, and they argue that, upon the undisputed facts in the case at bar, it falls within the principle of that decision. The trouble is they are assuming that the undisputed facts in the case

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at bar exist as they existed in the case cited. In that case the court said that Mrs. Harder was guilty of negligence in

"attempting to cross a busy street at a place where pedestrians were not supposed to cross. She was looking in a direction nearly opposite to the direction she was going. She walked no doubt rapidly, for she was hurrying to catch a car. She emerged from behind an express wagon into the path of vehicles, without looking for approaching vehicles. Her negligence is manifest."

In this case we have no such manifest negligence. The respondents' evidence shows that, before stepping off the curb into the street, they stopped and looked in all directions for approaching automobiles and could see none. The jury evidently believed in their veracity. Again, the instruction is faulty in that it instructs the jury that, if it was shown that the machine carried the ordinary side lights and such side lights were lighted, and the other circumstances existed as stated in the instruction, the plaintiffs were guilty of contributory negligence. This would leave out of view the evidence produced by respondents of a disinterested witness as to the insufficiency of the side lights, and would further leave out of view the testimony of respondents that they did not see or hear the car until about six feet away. It is true that this court has held repeatedly that a person crossing a city street must make reasonable use of his senses in order to observe impending danger. But the evidence in this case is that the respondents made reasonable use of their senses, and the jury seemed to believe them.

Again, appellants contend that the court erred in refusing to give the jury their second requested instruction, to the effect that, if the plaintiffs in so undertaking to cross Harvard avenue at the middle of the block saw appellants' car and assumed that it would pass down the east instead of the west driveway, where the law requires it to go, and upon such assumption stepped into collision with it, they were guilty of contributory negligence and could not recover. It

is argued in support of this assignment that respondents alleged in paragraph three of the complaint that they saw the car of appellants at the middle of the block. The statements contained in the paragraph of the complaint referred to are these:

"That while thus crossing Harvard avenue, a large, forty-horsepower Packard automobile, belonging to defendants, containing the defendant Cora E. Perkins, a minor son of defendants, and other persons, and driven southerly and then suddenly diagonally easterly and suddenly in a westerly direction on said avenue, either by the chauffeur in the employ of defendants or by said minor son or by one of the other occupants of such automobile, with the consent and at the request of defendants, ran into and collided with and knocked down both of these plaintiffs; all without any fault, negligence, or carelessness on the part of the latter."

We can see no allegation in that paragraph tending in any way to show that the respondents saw the car approaching them at any time previous to the time they testified that they saw it when it was about six to eight feet from them, coming very rapidly; and, as Mr. Tooker testified, as it came around the standing automobile in front of the Roycroft it had veered to the east to pass around it, and he assumed that it would pass east of him instead of west; that it then suddenly veered west, and it was all so quick it may be inferred that he could not tell where it was going, but attempted to throw his wife out of its way by thrusting her to the left and forward. There is no inference to be derived from this that the respondent assumed that the automobile would be driven down the east instead of the west driveway, contrary to the law of the road, or that, acting on such assumption, he stepped into collision with it. Great stress is laid upon this detail by appellants, and it is strenuously insisted throughout their argument that respondents assumed that the car would be driven down the east driveway instead of the west driveway, contrary to the law of the road. Neither of the respondents testified that they did so assume,

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and their actions as described by them, together with all the testimony, were questions of fact and inference for the jury, and we are unable to resolve this question as one of law. Even if they had assumed that the car would pass down the east driveway instead of the west and had acted upon that assumption, if its motions were as sudden and as rapid as they testified, it would still have been a question for the jury to determine whether the appellants were negligent. As was stated in *Sheffield v. Union Oil Co.*, 82 Wash. 386, 144 Pac. 529:

"Being in imminent danger, an emergency was presented, and whether, under this emergency, the respondent acted with due prudence is, under all the authorities, a question of fact for the jury. The law does not scrutinize too carefully an act done by one who has been put in a position of danger by the one who inflicts injury upon him, leaving it for the jury to say under such circumstances whether the act in seeking to avoid the danger was the act of an ordinarily prudent man."

See, also, *Van Dyke v. Johnson*, 82 Wash. 377, 144 Pac. 540.

It is insisted that, by refusing appellants' request for this instruction, there was taken from the jury the duty of determining the contributory negligence of the respondents in falsely assuming that the car would pass where the ordinance did not permit it to pass, and that the case should therefore be reversed under the authority of *Minor v. Stevens*, 65 Wash. 423, 118 Pac. 313, 42 L. R. A. (N. S.) 1178. The trial court gave substantially the instructions on negligence on the part of the users of dangerous instrumentalities such as automobiles, and contributory negligence on the part of pedestrians using the streets and in crossing the streets at places other than the street intersections, as were approved in the *Minor* case cited, from the observations in *Hannigan v. Wright*, 5 Penn. (Del.) 537, 63 Atl. 234. In the *Minor* case, those observations as to mutual duties of the parties

are said to be a fair statement of the law. So in this case, we think the trial judge gave very full, fair, and illuminating instructions upon these questions.

It is further contended that the trial court erred in submitting to the jury the ordinance respecting the sounding of a horn by an automobile operator in the presence of known danger; but we think this was proper. Respondents pleaded and relied in part on the violation by appellants of the ordinance. Under the circumstances shown by appellants themselves—that their headlights had gone out some time previously, that they were driving upon a dark street without such headlights as were required by the ordinance, and that they did not give any signal or warning to persons who might be using the streets either at the crossings, or otherwise, of the movement of their automobile—all these were questions of fact to be considered by the jury in weighing and determining whether or not it was the negligence of appellants that caused the injuries. It is true the ordinance does not in terms require that a horn or signal device be sounded in the middle of a block, but it does require that such signal device be sounded as a warning where danger exists to any person in or upon the street. It was for the jury to determine whether or not the conditions of the appellants' automobile existed as testified in behalf of respondents, and if so, whether it was negligence for the driver of the automobile not to sound his signaling device at any place in the streets. *Burian v. Seattle Elec. Co.*, 26 Wash. 606, 67 Pac. 214; 33 Cyc. 902, 1309; 2 Elliott, Roads and Streets (3d ed.), 443; *Peterson v. Seattle Elec. Co.*, 71 Wash. 349, 128 Pac. 650; *Sullivan v. Smith*, 123 Md. 546, 91 Atl. 456.

Appellants assign error in the refusal of the court to give an instruction requested by them, to the effect that, if the jury found from the evidence that, at the time the plaintiffs allege they came into collision with and were injured by defendants' automobile, said car had the side lights burning, and that the view from the place where the plaintiffs at-

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tempted to cross the street northward to East Harrison street was unobstructed, and that the plaintiffs, had they exercised due diligence, would have been able to discover the appellants' car as it approached East Thomas street; that they either failed to discover the approach of the car or, knowing of its approach, attempted to cross the street at the point alleged in the complaint one hundred to one hundred and fifty feet from the street intersection; the attempt to so cross the street at that place in front of an approaching car was itself an act of contributory negligence such as would prevent plaintiffs' recovery. Again, the trouble with this instruction is that it leaves out of consideration the question of whether the side lights were so burning as to constitute such lights as could be seen the distance that the requested instruction assumed. There is a conflict in the evidence upon this point and the evidence is not undisputed, but there is evidence tending to show that the side lights, even though lighted, could not be seen any distance to exceed ten or fifteen feet. It is obvious that, if respondents had reached the place ten or fifteen feet from where the car was approaching them and if, as their testimony tended to show, the car was approaching at a speed exceeding twenty or twenty-five miles an hour, the question of the lights and of their observation of the lights, as assumed in this instruction, was obviously improper. Had the requested instruction included the reference to the question of the sufficiency of the lights carried to be observed to such distance, it would have been proper. On this subject the court instructed the jury as follows:

"The failure to provide the lights required by this ordinance, if you find from the evidence the defendants did fail to provide them—and that is a question of fact for you to determine—would not constitute liability on the part of the defendants unless the failure to provide the lights was the proximate cause of the accident; and if you find from the evidence that the plaintiffs, as they crossed the street, had actual knowledge of the approach of the machine, whether from observation or any other kind, of light on the machine,

or from any sound emitted from the machine, if you find that these plaintiffs had actual knowledge of the approach of the machine, or ought to have had such knowledge in the exercise of reasonable care on their part, in season to avoid the collision that occurred, then the negligence of the defendants, if any, you could not hold them liable for damages, and the plaintiffs could not recover."

The court further instructed the jury:

"If you find that plaintiffs or either of them, were crossing Harvard avenue on foot at the point designated 100 to 150 feet north of the intersection of Thomas street, and further found that at the time they attempted to cross the street the night was dark, rain was falling, then I instruct you as a matter of law that plaintiffs were required to exercise a greater degree of care than if they had been attempting to cross at a street intersection, and it was their duty to exercise a great degree of care and diligence for the purpose of ascertaining whether automobiles or other vehicles were approaching; that is, to use a greater degree of diligence than if they were crossing at intersections. And if you find from the evidence that they did not exercise such a degree of care or diligence and that this was the proximate cause of the accident without which it would not have occurred, then they would be guilty of contributory negligence and cannot recover."

It seems, therefore, that the court instructed the jury as favorably to appellants as it could, and that they were in no wise prejudiced by the refusal to give the instructions requested by appellants upon the question of contributory negligence. *Mickelson v. Fischer*, 81 Wash. 423, 142 Pac. 1160; *Segerstrom v. Lawrence*, 64 Wash. 245, 116 Pac. 876; *Lewis v. Seattle Taxicab Co.*, 72 Wash. 320, 130 Pac. 341; *Chase v. Seattle Taxicab & Transfer Co.*, 78 Wash. 537, 139 Pac. 499; *Franey v. Seattle Taxicab Co.*, 80 Wash. 396, 141 Pac. 890; *Graham v. Allen & Nelson Mill Co.*, 78 Wash. 589, 139 Pac. 591; *Richmond v. Tacoma R. & Power Co.*, 67 Wash. 444, 122 Pac. 351; *Morrison v. Seattle Elec. Co.*, 63 Wash. 531, 115 Pac. 1076; *Edwards v. Seattle, Renton*

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& *Southern R. Co.*, 62 Wash. 77, 113 Pac. 563. We conclude, therefore, that all the questions relied upon by appellants were questions of fact, properly submitted to the jury under fair and comprehensive instructions.

The last complaint made by appellants is that the verdict is too large. In any event, the recovery for the husband could not have been over \$700 under the demand of the complaint, which, after the verdict was reduced by the court to \$3,000, leaves the sum of \$2,300, apparently allowed the wife. Inasmuch as she had no earning capacity, this was undoubtedly awarded to her for her pain and suffering and permanent injuries. It certainly seems large, but it is not so excessive that we can say that the amount of the judgment is the result of passion or prejudice or any illegal influence. We do not feel, therefore, that we are justified in interfering. *Hammons v. Setzer*, 72 Wash. 550, 130 Pac. 1141; *Kelly v. Navy Yard Route*, 77 Wash. 148, 137 Pac. 444. The trial judge having interfered to the extent of reducing the verdict by \$1,000, and having seen the parties and heard their testimony, and having exercised his discretion as to the amount which the respondents should recover, we will not interfere. *Lynch v. Northern Pac. R. Co.*, 67 Wash. 113, 120 Pac. 882.

The judgment is affirmed.

MORRIS, C. J., MOUNT, MAIN, and ELLIS, JJ., concur.

[No. 12563. Department One. August 11, 1915.]

JOHN D. COCHRAN *et al.*, *Appellants*, v. PHILLIP REMILLARD
et al., *Respondents*.¹

APPEAL—REVIEW—FINDINGS. In actions tried to the court without a jury, legal or equitable, there must be a trial *de novo* on the record, and the judgment will be affirmed only when the supreme court is satisfied that the evidence does not preponderate against the findings.

VENDOR AND PURCHASER—SALE OF LAND—FRAUD—EVIDENCE—SUFFICIENCY. In an action for rescission of a trade on the ground of defendant's fraud in falsely representing that 310 acres of his land was cultivated, findings for the defendant are sustained by his testimony and that of two other witnesses to the effect that defendant represented that there were about 310 acres cultivated, that it had never been measured and he did not know its exact area, but had bought it for that, and that plaintiff became suspicious and on that account demanded and received considerable additional personal property in the trade.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered October 30, 1914, upon findings in favor of the defendants, in an action for damages for fraud, tried to the court. Affirmed.

Herbert C. Bryson, for appellants.

John C. Hurspool and *E. W. Benson*, for respondents.

HOLCOMB, J.—Appellants brought their action to recover from the respondents the sum of \$1,198.20, as the value of an alleged shortage in the respondents' acreage of lands sold by respondents to appellants. It was alleged that the stipulated price of the lands was \$55 per acre, and that respondents falsely represented that there were 310 acres of land in cultivation and farmed for grain, but in truth and fact there were only 270.06 acres of land cultivated and farmed in grain; that the land was hilly and irregular in shape so that its area could not be ascertained, and that they believed and

¹Reported in 150 Pac. 1197.

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relied upon these representations. Respondents denied a purchase at any stated sum per acre, alleged an exchange of properties, denied the allegations as to misrepresentations and averred that appellants relied upon their own inspection, investigation, and knowledge. On these issues, the parties went to trial, waiving a jury and trying the case to the court. The testimony on these issues is conflicting, not in degree, but totally. The court believed the respondents and their witnesses, and found accordingly.

Respondents erroneously assume that "if there is any evidence to support the findings it becomes our duty to affirm the decision." We again point out for the benefit of the profession that such is not the rule, as has been pointed out in a great number of cases the past few years. The rule is, in cases tried by the superior court without a jury, whether law or equity, that we must try them on the record made below, but *de novo*; and will affirm the trial court when, and only when, we can say that we are satisfied that the evidence does not preponderate against the findings. *Baker v. Yakima Valley Canal Co.*, 77 Wash. 70, 137 Pac. 342, and many cases down to and including *Cornwall v. Anderson*, 85 Wash. 369, 148 Pac. 1. But even under the rule so stated, there is ample testimony to support the trial court in its findings, so that we cannot here say that we are satisfied the evidence preponderates against the findings.

As against the testimony of appellants and their son, placing the strongest construction thereon that can be placed as to the representations of quantity, there is the testimony of respondent Phillip Remillard and two other witnesses, that it was represented to appellants that there were *about* 310 acres in cultivation, in grain, alfalfa, orchard, and garden; that the land had never been measured or surveyed; that respondent did not know the exact area in cultivation, but had bought it for that; that Mr. Cochran and his son had become "suspicious," had questioned the acreage in cultivation before the contract was signed, and had demanded, because thereof,

considerable personal property additional, and that a combine harvester, a grain drill, a disc plow, and 225 sacks of barley had been added and conveyed to him. In exchange for the land and personal property, appellants conveyed their apartment house and furniture.

Further discussion is needless and profitless. The trial court having seen the parties and witnesses, observed their manner of testifying, being fully capable of judging of their understanding and credibility, and finding for respondents upon competent and sufficient evidence, we will not disturb the result.

The judgment is affirmed.

MORRIS, C. J., MOUNT, CHADWICK, and CROW, JJ., concur.

[No. 12576. Department Two. August 11, 1915.]

THE STATE OF WASHINGTON, *on the Relation of H. B. Ridgely et al., Plaintiff*, v. THE SUPERIOR COURT FOR CHELAN COUNTY *et al., Respondents*.¹

RECEIVERS — APPOINTMENT — NOTICE. An order appointing a receiver without notice, and without limiting the appointment to a day certain fixed by the court upon which a hearing can be had, is without jurisdiction and void.

SAME — APPOINTMENT — PROCEEDINGS — VALIDITY — ESTOPPEL. Where an order appointing a receiver without notice was void for want of jurisdiction, a motion to quash the order of appointment, and acquiescence in the order of the court denying the motion, does not estop the party from questioning the subsequent acts of the court in issuing a writ of assistance to put the receiver in possession; since the appointment being void, the court was without jurisdiction to issue the writ of assistance.

Certiorari to review an order of the superior court for Chelan county, Grimshaw, J., entered December 31, 1914, granting a writ of assistance, in proceedings for the ap-

¹Reported in 150 Pac. 1153.

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pointment of a receiver for an insolvent corporation. Reversed.

Reeves, Crollard & Crollard, for relators.

Sam R. Sumner, Reeves Aylmore, Jr., and Gay & Kelleran,
for respondents.

FULLERTON, J.—On October 23, 1912, Nancy C. Howell and J. D. Gibbs, as copartners, began an action in the superior court of King county against the Blewett Mine Leasing Company, a corporation, alleging facts tending to show that they were minority stockholders in the corporation; that the corporation was insolvent; that it had forfeited its franchise and was subject to dissolution; that a receiver was necessary to preserve its property, and prayed for the appointment of a receiver, and for such other relief as was appropriate under the allegations of the complaint. On the day the complaint was filed, the court entered an *ex parte* order appointing one A. E. Flagg “to be receiver of all of the property of the defendant company, . . . to immediately qualify . . . as receiver . . . and to immediately take possession all and singular the property, real, personal and mixed of the defendant company . . .” The receiver immediately qualified as directed, by taking the oath and giving bond as required, and later on demanded possession of the corporation’s property from its secretary and treasurer, who refused to turn the property over to him. Subsequently an additional order was made, likewise *ex parte*, directing the receiver to take possession of the property of the corporation. Subsequently the receiver, acting under this order, demanded the books of the corporation from the secretary, which were denied him. He thereupon sought an order of the court for possession of the books, and obtained an order against the secretary requiring him to show cause why the same should not be delivered to him. This application seems not to have been prosecuted further, and neither

the books of the corporation nor its property were ever delivered to him.

On November 12, 1912, the corporation appeared and demurred to the complaint. Later on it moved for a change of venue of the action from the county of King to the county of Chelan, and in separate motion filed at the same time, but "without prejudice to its foregoing motion to change the venue of the above entitled action, but still insisting thereon, and only in the event said motion be denied and overruled," moved to quash the *ex parte* order appointing the receiver. The court granted the motion for change of venue and, in the same order, denied the motion to quash; the order being entered on October 24, 1914.

After the cause had been transferred to Chelan county, the superior court of that county, on an application made upon notice, granted to the receiver a writ of assistance, dated December 31, 1914, directed to the sheriff of Chelan county, commanding that officer to put the receiver in possession of the property of the corporation.

The present proceeding is brought on the relation of H. B. Ridgely, The Blewett Mine Leasing Company, Chris Corbett and others, to review the last mentioned order, and the prior orders of the court made with relation to the receivership. It is the contention of the relator that the original order appointing the receiver is void because made without notice, and that all subsequent orders made with reference thereto are likewise void because of the invalidity of the original order.

The statutes relating to the appointment of receivers are found in Rem. & Bal. Code, §§ 740 to 744 inclusive (P. C. 81 §§ 531 to 543). While these statutes define the causes for which a receiver may be appointed with some minuteness, they are silent as to the method of procedure necessary to procure an appointment of a receiver, and silent as to the necessity of notice to the opposing party of the grounds upon which and the time at which an application for such

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an appointment will be made. This court has heretofore held, however, that the appointment of a receiver without notice, and without limiting the appointment to a day certain, fixed by the court, upon which the parties adversely affected by the appointment could appear and contest the appointment, is without jurisdiction and void. *Larsen v. Winder*, 14 Wash. 109, 44 Pac. 123, 53 Am. St. 864; *Cole v. Price*, 22 Wash. 18, 60 Pac. 153; *State ex rel. Washington Match Co. v. Superior Court*, 34 Wash. 123, 74 Pac. 1070; *Libert v. Unfried*, 47 Wash. 182, 91 Pac. 774.

In *Larsen v. Winder*, the court, after stating the rule relative to the necessity of notice to the adverse party of an application for the appointment of a receiver, quoted with approval from *Salling v. Johnson*, 25 Mich. 489, the following:

"It is not necessary to explain that such a proceeding [the appointment of a permanent receiver without notice] is not within the judicial power of any one, and is a pure usurpation. The order can not lawfully be enforced, and should be expunged, as soon as possible, as made without proper consideration."

In *State ex rel. Washington Match Co. v. Superior Court*, the following language was used:

"The trial court seemed to be of the opinion that its temporary appointment of a receiver continued indefinitely, if no motion to discharge the same was made. This is not the rule. While the court may, on an *ex parte* application where an emergency is shown, appoint a receiver to take temporary charge of property until notice can be given and a hearing had on the question of the necessity for a receiver, such *ex parte* appointment has no force beyond such hearing, and a failure to make an order after such a hearing appointing a receiver, or continuing the first appointment, would operate to discharge the temporary receiver."

It is objected by the respondents that an order appointing a receiver, made without notice to the adverse party, is voidable rather than void, and will be deemed acquiesced in unless

moved against within a reasonable time. Cases are cited from other jurisdictions which maintain the doctrine, and an argument is put forth attempting to show that our own cases are not inconsistent therewith. But we think they are inconsistent. On the question whether such an order is void or only voidable, the courts in other jurisdictions are divided, and we have joined with the courts holding such orders void. This rule we have adhered to since the early history of the court, and departure therefrom is not now to be considered.

Again, the respondents say that the relators other than the Blewett Mine Leasing Company have no standing in this court, since they were not parties to the action below, and that the Blewett Mine Leasing Company is estopped from questioning the appointment of the receiver, because it moved to quash the order of appointment in the court below and acquiesced in the order of the court denying its motion. But it is plain that, if the order appointing the receiver had no validity as an order when made, it was not given validity by this motion. To move to strike from the record a void order does not make the order valid, nor does it estop the moving party from questioning subsequent acts of the court based upon the order. The case of *Flueck v. Pedigo*, 55 Wash. 646, 104 Pac. 1119, does not maintain a contrary doctrine. That case is rested on the principle of *res judicata*. The plaintiff sought to try out in one proceeding a question that had been adjudicated against him in another. The court held him estopped by reason of the judgment in the former proceeding, but took care to say that it did not hold the judgment against which the attack was made to be a valid judgment.

In the argument advanced on the part of the respondents, it is assumed that the receiver was at one time in the possession of this property and was ousted therefrom by the relators. We cannot accept this view of the record. As we read it, the receiver never was in possession and never made any serious attempt, prior to the time he procured the order

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in review, to obtain possession. The argument based on this theory of the case by the respondent does not therefore require notice. It is our opinion that the original order of the court appointing the receiver was void, and that, in consequence, the court below was without jurisdiction to direct the issuance of the writ of assistance here in review. The order directing the writ to issue is therefore reversed, and the writ directed to be quashed.

MORRIS, C. J., CROW, ELLIS, and MAIN, JJ., concur.

[No. 12593. Department One. August 11, 1915.]

NORTHERN COMMERCIAL COMPANY, *Appellant*, v. BIG FOUR
TRADING COMPANY *et al.*, *Respondents*.¹

LIMITATION OF ACTIONS—RUNNING OF STATUTE—CONCEALMENT OF DEFENDANT. The statute of limitations is not tolled by the "concealment" of the defendant in this state, within the meaning of Rem. & Bal. Code, § 168, tolling the statute of limitations as to actions that accrue against any person who shall be out of the state or "concealed" therein, where it appears that the defendant, the maker of a note, executed at C. in Alaska, lived at C. for two years after the note became due, and then went to other parts of Alaska where he did business in his own name, and came to this state three years after the note became due, where for eleven years he resided in an open manner known to his neighbors by his true name only.

SAME—RUNNING OF STATUTE—REVIVAL—PART PAYMENT. Where judgment upon a partnership note was entered against the partnership and one of the partners personally, his partial payment of the judgment is a payment on the judgment and not on the note, and does not revive the obligation against a partner not served in the action, after the statute of limitations had run upon the note, in the absence of express authority to make such a payment.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 31, 1914, upon findings in favor of the defendants, in an action on a promissory note, tried to the court. Affirmed.

¹Reported in 150 Pac. 1151.

Davis & Palmer, for appellant.

Arctander & Jacobsen, for respondent.

MOUNT, J.—This action was brought to recover upon a promissory note executed by the Big Four Trading Company at Council City, Alaska. The defense was the statute of limitations. The case was tried to the court without a jury. Findings were made to the effect that the action was barred, and an order of dismissal was entered. The plaintiff has appealed.

The facts are substantially as follows: From the year 1900 to the spring of 1902, Charles Lubbe, Edmund Thomasson, Peter T. Nelson, and E. G. Lubbe, were doing business as a partnership at Council City, Alaska, under the name of Big Four Trading Company. On June 19, 1901, the note in question was executed by Charles Lubbe, one of the partners. The note was due on June 15, 1902. Prior to the time the note became due, Peter T. Nelson sold his interest in the partnership and retired therefrom. Mr. Nelson continued to reside in Council City after the dissolution until the year 1904. In that year he went to Fairbanks, Alaska, where he lived until August, 1905, being engaged in business in his own name. In August he went from Fairbanks to Nome, Alaska, remained there a short time, and in October went from Nome to Seattle, in this state, where he arrived the latter part of October, 1905. After arriving in Seattle, he was engaged in business for a little more than a year. He then moved onto a farm in King county, where he has ever since resided.

In August, 1906, the appellant brought an action upon this same note against the partnership in the United States District Court for Alaska. This respondent, Peter T. Nelson, was not served with process in that action. Afterwards a judgment therein was rendered against the Big Four Trading Company, and the partners Edmund Thomasson and Charles Lubbe, who had been personally served therein.

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Subsequently, on December 30, 1912, Charles Lubbe paid \$2,500 upon that judgment. Afterwards, on April 11, 1913, this action was brought in this state, and service was had upon Peter T. Nelson on April 11, 1913, or about 11 years after the note became due, and more than seven years after Mr. Nelson began his residence in this state.

The appellant contends that the action is not barred by the statute of limitations for two reasons: First, because the appellant did not know the whereabouts of the respondent Peter T. Nelson prior to the time the action was brought; and second, that the action was revived by the payment of \$2,500 by Mr. Lubbe in Alaska.

The statutes of this state provide at § 157, Rem. & Bal. Code (P. C. 81 § 55), that an action upon a contract in writing must be commenced within six years. Section 168, upon which the appellant relies, provides as follows:

“If the cause of action shall accrue against any person who shall be out of the state or concealed therein, such action may be commenced within the terms herein respectively limited after the return of such person into the state, or after the time of such concealment”

It is contended by the appellant that, because Mr. Nelson left the territory of Alaska without informing the appellant where he was going, and because the appellant did not know where Mr. Nelson was residing, he was therefore concealed, within the meaning of the statute, and that the statute of limitations for that reason has not run. *Harman v. Looker*, 73 Mo. 622, is cited in support of this contention. It is claimed that the statute of Missouri is identical with our statute, above quoted, and that the facts in this case are identical with the facts in the Missouri case. We think the Missouri case cited is distinguishable from the case at bar upon both the facts and the law. In the Missouri case, the debtor secretly abandoned his home and removed to another state. The facts in this case show that the respondent lived in Alaska in the town where the note was made for two

years after the note became due. He then went to other parts of Alaska and remained there for a time, and did not come to this state until three years after the note became due. We think the facts in this case fail to show any clandestine or secret removal from Alaska to this state. The statute of Missouri upon the subject under consideration is different from the statute of this state. The case of *Herman v. Looker*, 73 Mo. 622, *supra*, was referred to in *Rhoton v. Mendenhall*, 17 Ore. 199, 20 Pac. 49, where the court said:

"The Missouri statute under which their decisions were made provides: 'If any person, by absconding or concealing himself, or by other improper act, prevent the commencement of an action, such action may be commenced within the time herein limited after the commencement of such action shall have ceased to be so prevented.'"

Our statute provides only for being out of the state, or for concealment therein. The record in this case shows, and it is conceded in the brief of the appellant, "that since coming into the state of Washington the respondent has resided in an open manner, and has been known to his neighbors under his true name and none other;" and the evidence clearly bears out that statement. We think it cannot be said, under the conceded facts in this case, that the respondent, since coming to this state, has concealed himself in any way. It is plain, therefore, that the action was barred in this state after the lapse of six years. This view is supported by the case of *Rhoton v. Mendenhall*, *supra*, and the following cases: *Frey v. Aultman, Miller & Co.*, 30 Kan. 181, 2 Pac. 168; *Talcott v. Bennett*, 49 Neb. 569, 68 N. W. 931; *Müller v. Lesser*, 71 Iowa 147, 32 N. W. 250; *Engel v. Fischer*, 102 N. Y. 400, 7 N. E. 300, 55 Am. Rep. 818.

It is next contended that the payment of \$2,500 on December 30, 1912, revived the action. It is not shown that the respondent Nelson knew of this payment, or authorized it. The payment was made upon a judgment which was ob-

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tained personally against Mr. Lubbe. The respondent Nelson had not, for a period of more than ten years, been a member of the Big Four Trading Company. There is no showing that he either advised or counseled the payment, or even knew about its being made. It was made upon the judgment by a judgment debtor, and not upon the note. In *Perkins v. Jennings*, 27 Wash. 145, 67 Pac. 590, we said:

"In *Stubblefield v. McAuliff*, 20 Wash. 442 (55 Pac. 637), this court adopted the rule that one of two co-obligors cannot make a promise that will revive or continue an obligation as against the other, without express authority so to do. This rule was also followed in *Bassett v. Thrall*, 21 Wash. 231 (57 Pac. 806). The case of *Stubblefield v. McAuliff*, *supra*, was cited approvingly in recent decisions from this court not published, and the doctrine above stated must now be considered as the settled rule of this court."

It is plain, therefore, that the payment of \$2,500 by Mr. Lubbe upon a judgment against him, did not revive the obligation against Peter T. Nelson, the respondent here, without a showing of express authority so to do. No attempt was made to prove any such authority.

The judgment must be affirmed.

MORRIS, C. J., MAIN, ELLIS, and HOLCOMB, JJ., concur.

[No. 12625. Department One. August 11, 1915.]

SEATTLE TAXICAB & TRANSFER COMPANY, *Appellant*, v.
THE CITY OF SEATTLE *et al.*, *Respondents*.¹

MUNICIPAL CORPORATIONS—POLICE POWERS—TAXICAB DRIVERS—SOLICITATION—ORDINANCES—CONSTRUCTION. An ordinance regulating the conduct of taxicab and other drivers forbidding them to be at certain places or upon the property of transportation companies, "while engaged in such occupation and soliciting customers or passengers for hire," does not prohibit them from entering such places when they are not soliciting patronage; nor does it attempt to regulate transportation companies; and the same is a lawful regulation of such solicitations, as a protection of the public.

SAME—POLICE POWERS—ORDINANCES—"SOLICITING." In an ordinance regulating solicitation by taxicab and other drivers, and confining the same to certain places, "soliciting" within the meaning of the ordinance is to ask for and seek to obtain the right to carry passengers or their baggage for hire by actual persuasion or persistent entreaty, and the mere presence of a driver, whether in uniform or not, and whether alone or accompanied by a vehicle, is not "soliciting."

SAME—OFFICERS—ACTIONS—PERSONAL LIABILITY FOR COSTS. In an action against a city and its chief of police to enjoin the enforcement of certain ordinances, in which the chief was acting without personal interest and as the mere agent of the city, it is error, on giving judgment against the defendants, to enter judgment for costs against the chief personally.

INJUNCTION—ACTIONS—ISSUES AND RELIEF—REMEDY AT LAW—CRIMINAL PROCESS. In an action to enjoin certain acts of police officers in the enforcement of an ordinance regulating solicitation by taxicab and other drivers, it is error, in granting the relief sought, to enter a decree enjoining the plaintiff from soliciting passengers and baggage for hire in any other manner or places than that fixed by the ordinance, where the defendant had asked no such relief, and where the enforcement of the ordinance by criminal process is a sufficient protection against violation of the ordinance.

Cross-appeals from a judgment of the superior court for King county, Frater, J., entered November 4, 1914, in favor of the plaintiff, in an action for an injunction, tried to the court. Modified.

¹Reported in 150 Pac. 1134.

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Brightman, Halverstadt & Tennant, for appellant.*James E. Bradford* and *William B. Allison*, for respondents.

MOUNT, J.—This action was brought by the plaintiff to restrain the city of Seattle and its police officers from making alleged unlawful arrests of drivers of taxicabs within the city of Seattle. On a trial of the case, the court entered an order restraining the city and its police officers “from interfering with any of the vehicles of the plaintiff, and from controlling the location or position of the same under and by virtue of said ordinance, except when the drivers or persons in charge of such vehicles are actually engaged in soliciting passengers or baggage for hire outside of the limits fixed in said ordinance for soliciting.” The court also adjudged “that ‘soliciting’ within the meaning of said ordinance, is to ask for, or to seek to obtain the right and privilege of passengers to transfer such passengers or their baggage for hire by actual persuasion or persistent entreaty, and that the presence of any of the plaintiff’s officers, agents, servants, or employees, either in or not in uniform of the plaintiff alone, or accompanied by any vehicle of the plaintiff with or without its name thereon, is not soliciting within the meaning of said ordinance.” The court enjoined the plaintiff “from soliciting passengers or baggage for hire, in any other manner, or at any other place or places than that fixed in said ordinance.” The court further ordered that the plaintiff have and recover its costs and disbursements from each of the defendants. The defendants have appealed from that part of the order which restrains the city and its officers from arresting drivers when not actually engaged in soliciting passengers for hire, and from the order defining “soliciting,” and from the order that the plaintiff shall recover costs from each of the defendants. The plaintiff has appealed from that part of the order which enjoins the plaintiff from soliciting baggage or passengers

for hire in any other manner or at any other place or places than as fixed in the ordinance. We shall, therefore, in this opinion, designate the parties as plaintiff and defendants.

The principal facts in the case are not in dispute. It appears that, in August, 1914, an ordinance was passed by the city council relating to the conduct of persons while engaged as hack and taxicab drivers, providing a penalty for violation of the ordinance, and repealing certain other ordinances of the city. This ordinance, omitting the title, is as follows:

"Section 1. It shall be unlawful for any hack, taxicab, automobile or omnibus driver, hotel runner, steamboat runner, expressman or solicitor while engaged in such occupation and soliciting customers or passengers for hire, to go upon, stand or be, or allow or permit his, or the vehicle or any vehicle under his control at such time, to stand upon or occupy any street, avenue, alley, viaduct, overhead bridge or other public place, except the following: That portion of King street in the city of Seattle lying east of the east line of Second avenue south and west of a line twenty (20) feet west of the west line of Third avenue south as vacated by Ordinance No. 2849; that portion of Fourth avenue south lying south of the south line of Jackson street; that portion of Railroad avenue lying west of the center line of said Railroad avenue.

"Section 2. It shall be unlawful for any hack, taxicab, automobile or omnibus driver, hotel runner, steamboat runner, expressman or solicitor, while engaged in such occupation and soliciting customers or passengers for hire, to go further than three (3) feet upon the sidewalk on either the north or south side of that portion of King street described in section 1 of this ordinance, or on either the east or west side of said Fourth avenue south lying south of the south line of Jackson street, measuring from and being that part of the sidewalk next to and abutting upon the gutter. It shall be unlawful for any hack, automobile, taxicab or omnibus driver, hotel runner, steamboat runner, expressman or solicitor while engaged in such occupation and soliciting customers or passengers for hire, to stand or be, or allow or permit his, or the vehicle or any vehicle under his control at such time on said Railroad avenue west of the center line of

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said Railroad avenue in front of any gangway or roadway leading into any wharf or dock, or to allow or permit any vehicle under his control to stand less than sixteen (16) feet from any wharf or building on the west side of Railroad avenue.

"Section 3. It shall be unlawful for any hack, taxicab, automobile or omnibus driver, hotel runner, steamboat runner, expressman or solicitor while engaged in such occupation and soliciting customers and passengers for hire, to stand at any place other than directly in the rear of and within three (3) feet of the vehicle or conveyance in use by him or under his control or for which he is soliciting customers and passengers for hire, and it shall be unlawful for any hack, taxicab, automobile or omnibus driver, hotel runner, steamboat runner, expressman or solicitor, while engaged in such occupation and soliciting customers and passengers for hire, to stand in the rear of any vehicle or conveyance not in use by him or under his control or unless he shall be soliciting customers and passengers for such vehicle or conveyance.

"Section 4. No hack, taxicab, automobile or omnibus driver, hotel runner, steamboat runner, expressman or solicitor, while acting as such and soliciting customers or passengers for hire, shall stand or go into any gangway or roadway at any wharf or railroad station, when such gangway or roadway is being used by passengers coming from or going to such wharf or railroad station.

"Section 5. No hack, taxicab, automobile or omnibus driver, hotel runner, steamboat runner, expressman or solicitor soliciting customers or passengers for hire, either for himself or another, shall call out to passersby, nor shall any such hack, taxicab, automobile or omnibus driver, hotel runner, steamboat runner, expressman or solicitor purposely stand in front of, or among passengers, or take hold of the baggage of any such passenger without his or her first requesting him so to do, nor make derogatory remarks of rival houses, nor insulting remarks to passengers declining to go with him.

"Section 6. It shall be unlawful for any hack, taxicab, automobile or omnibus driver, hotel runner, steamboat runner, expressman or solicitor while engaged in soliciting customers or passengers for hire, to go into or upon any wharf

or railroad station in the city of Seattle when such wharf or railroad station is being used by passengers leaving or entering such wharf or railroad station.

"Section 7. Any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not exceeding one hundred dollars, or imprisoned in the city jail for a term not exceeding thirty days, or may be both fined and imprisoned." Ordinance No. 33,381.

The rest of the ordinance is immaterial to a consideration of this case.

It also appears that the plaintiff is engaged in the taxicab business in the city of Seattle; that, prior to the time this ordinance was passed, it had exclusive permits from railway companies entering the city of Seattle to stand their taxicabs upon the property of the railway companies; also to enter certain docks with their taxicabs; that these railway companies and transportation companies are carriers operating into the state of Washington and into the city of Seattle from other states and countries; that these transportation companies sell tickets upon their lines which carry the passengers in the taxicabs of the plaintiff to different stations of railways and steamboats within the city of Seattle; that the plaintiff has the privilege of sending men upon steamboats entering Seattle, and upon railway trains, before they reach the city of Seattle, to solicit baggage and passengers upon such boats and trains when these passengers reach the city of Seattle. It also appears that the places described in the ordinance where taxicabs and other vehicles may stand when soliciting passengers for hire, are upon streets upon which depots and wharves front. It also appears that the police officers in the city of Seattle have arrested drivers of the plaintiff's taxicabs while they were upon wharves within the city and not soliciting passengers for hire; that when taxicabs were at the depots upon private property of the transportation companies, where they were permitted to go by the transportation companies, police of-

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ficers have arrested drivers for being there, when they were not actually engaged in soliciting passengers.

Upon the trial in the court below, the plaintiff, by its counsel, admitted that the ordinance was valid, but there contended, and in its brief contends in this court, that drivers of taxicabs who are not engaged in soliciting passengers for hire are not violators of the terms of the ordinance, and that the arrest of these drivers is illegal and unwarranted interference with the lawful conduct of the business of the plaintiff.

The defendants, in their brief upon their appeal, contend, first, that it is unlawful under the ordinance for the drivers of taxicabs to be upon railroad premises, and to be upon the docks of transportation companies, even though they are not actually engaged in soliciting passengers or baggage, and that, under the ordinance, the officers of the city have the right to arrest such drivers. The object and intent of the ordinance above quoted, it seems to us, is clear. In every section where the drivers of taxicabs and other vehicles are forbidden to be, it is coupled with the statement, "while engaged in such occupation and soliciting customers or passengers for hire." We think it was plainly the intent of this ordinance to protect the traveling public from annoyance by drivers of taxicabs and other vehicles, and to prevent such drivers from annoying passengers as they go to and depart from such depots and wharves. It was clearly not the intention of the ordinance to prohibit taxicabs and other vehicles from entering upon passenger depot property, or upon wharves in connection with steamboat transportation, at other times than those stated, because the ordinance does not in terms prohibit persons from occupying such premises when they are not soliciting patronage.

Argument is made in the brief of the defendants to the effect that the city has the right to pass such an ordinance as the one in this case. In the case of *Seattle v. Hurst*, 50 Wash. 424, 97 Pac. 454, 18 L. R. A. (N. S.) 169, we had

under consideration the ordinance which was repealed by the ordinance now in question; and we there held that the city, in the exercise of its police power, might reasonably regulate the business of carrying passengers for hire within the city limits; and at page 432 we said:

"The ordinance does not affect the right of the railway or depot company to employ men for itself, or to contract so as to permit one company or person or any number of persons, to care for the comfort or desires of passengers. The ordinance simply prohibits solicitors from soliciting business from passengers at certain times in railway stations, and nothing more."

The effect of the ordinance now under consideration is the same as that ordinance. It undertakes only to regulate these drivers of vehicles while engaged in such occupation *and soliciting customers or passengers for hire*. We have no doubt of the right of the city to pass the ordinance. In fact, the validity of it, as stated above, is conceded by the plaintiff.

The defendants apparently argue that the transportation companies have no right to grant to one taxicab company the exclusive privilege of entering upon its property. That question is not in this case. The ordinance does not by its terms affect the contracts of the railway companies with other carriers. It does not undertake to do so. It simply provides that, when persons are engaged in the occupation of taxicab or other drivers, and "while engaged in soliciting customers or passengers for hire," they shall station themselves in certain places. It does not undertake to say that all persons shall be permitted upon the depot property or the wharves of carriers. It simply regulates the conduct of drivers while they are upon such property, and provides where they shall stand outside of such property when they are soliciting patronage. So it is apparent that there has been no attempt by this ordinance to regulate the conduct of transportation companies, such as railroads, steamboats,

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etc., but only to regulate the conduct of drivers of taxicabs within the city. We have no doubt that the city can make such regulations, and that is all it has attempted to do.

The defendants further argue that the court erred in defining "soliciting" as used in the ordinance. In passing upon this question, the trial court said that "'soliciting,' within the meaning of said ordinance, is to ask for, or to seek to obtain the right and privilege of passengers to transfer such passengers or their baggage for hire by actual persuasion or persistent entreaty, and that the presence of any of the plaintiff's officers, agents, servants, or employees, either in or not in uniform of the plaintiff, alone, or accompanied by any vehicle of the plaintiff, with or without its name thereon, is not soliciting within the meaning of said ordinance." We think no valid objection can be made to this definition of the word "soliciting" as the same is used in the ordinance in question. As stated above, the purpose of this ordinance was to protect travelers so that they might not be subjected to inconvenience or annoyance, and the words "soliciting customers or passengers for hire" mean that drivers, when asking persons to become patrons of their cabs, shall be at a certain place or places. The mere fact that the driver of a cab was standing upon the street, mute, with his cab, could not be construed as soliciting, under the terms of this ordinance. The city plainly did not intend that if a taxicab driver was sitting upon the seat of his cab at some other place in the city, saying nothing, that he would be subject to arrest because he was without the places named in the ordinance. The police officers of the city of Seattle, prior to the bringing of this action, had construed the ordinance to prohibit taxicab drivers from being at any other place than the places mentioned in the ordinance, whether they were actively soliciting or not. The fact that a driver wore a cap or uniform, or upon his cab was a designation of the fact that the cab was for hire, was construed by the police officers as an act of solicitation, for

which the driver was arrested. It was to prevent this that the action was brought. We think the court very properly defined what constituted soliciting within the meaning of the ordinance.

It appeared upon the trial that the defendant Griffiths was chief of police in the city of Seattle. He was made a party to the action, and the court adjudged that the plaintiff recover its costs from each of the defendants. It is argued by the plaintiff that this was error, because the chief of police was acting as an agent of the city, and that the costs should not be taxed to him personally. We think this position must be sustained. In *Townsend Gas & Elec. Light Co. v. Hill*, 24 Wash. 469, 64 Pac. 778, we held, that where an action was brought against the officers of a city in their individual capacity, that they need not furnish a bond on appeal. We think the same reasoning should apply in a case of this kind where the defendant Griffiths is simply the agent or officer of the city, and is not personally interested in the result of the litigation, and that he should not be liable for costs personally in a case like this. In this respect we think the trial court erred.

The plaintiff contends upon its appeal that the court erred in enjoining and restraining the plaintiff from soliciting passengers and baggage for hire in any other manner or at any other place or places than that fixed in the ordinance. The contention is, first, that no such relief was demanded by the defendants in their answer, and second, that the enforcement of the ordinance by criminal process when its terms are violated is a sufficient protection, and that a restraining order is not necessary for the benefit of the city. We think both of these propositions must be sustained.

We are satisfied, for the reasons herein stated, that the trial court was right in enjoining the officers from arresting the drivers of the plaintiff's taxicabs when such drivers were not actively engaged in soliciting passengers in prohibited

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places. The trial court was right in defining the meaning of the word "soliciting," as used in the ordinance. But the court erred in taxing costs against the chief of police; and erred in restraining the plaintiff from soliciting passengers for hire at other places than those fixed in the ordinance. Since the decree must be modified in the particulars mentioned, neither party will recover costs upon this appeal.

MORRIS, C. J., MAIN, and HOLCOMB, JJ., concur.

[No. 12626. Department Two. August 11, 1915.]

ELLEN INMAN *et al.*, *Respondents*, v. THE CITY OF SEATTLE,
Appellant.¹

APPEAL—DECISIONS APPEALABLE—JUDGMENT—PREMATURE APPEAL. An appeal will be dismissed as premature where it was taken by oral notice, immediately upon denying defendant's motion for judgment notwithstanding the verdict, before entry of judgment upon the verdict either by the clerk or judge, and before disposal of plaintiff's motion for a new trial.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 10, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Appeal dismissed.

James E. Bradford and *Melvin S. Good*, for appellant.

J. P. Ball and *Wm. T. C. Ball*, for respondents.

MAIN, J.—The purpose of this action was to recover damages for personal injuries. After the issues were framed, the cause came on for trial before the court and a jury on October 2, 1914. On October 5, 1914, the jury returned a verdict in favor of the plaintiff and against the defendant, the city of Seattle, in the sum of \$25. On this day and immediately after returning the verdict, the defendant city filed its motion for judgment notwithstanding the verdict.

¹Reported in 150 Pac. 1055.

On October 7, 1914, the plaintiff filed a motion for a new trial, on the ground that the damages awarded by the jury's verdict were inadequate, and were awarded under the influence of passion and prejudice. On October 10, 1914, the motion of the defendant city for a judgment notwithstanding the verdict was denied, whereupon the city in open court gave notice of appeal.

It does not appear from the record before us upon this appeal that the trial court in any manner passed upon the plaintiff's motion for a new trial. Neither does it appear that a judgment had been entered upon the verdict. The respondent moves that the appeal be dismissed, and that the cause be remanded to the superior court in order that the plaintiff's motion for a new trial may be passed upon by that court. This motion must be sustained for two reasons: First, the record shows neither that the statutory judgment had been entered upon the verdict by the clerk, nor that a formal written judgment had been signed by the trial judge and entered; and second, since the plaintiff's motion for a new trial was pending and undisposed of at the time the appeal was taken, the appeal was premature.

The appeal will be dismissed, and the cause remanded in order that the trial court may pass upon the plaintiff's motion for a new trial.

Appeal dismissed.

MORRIS, C. J., FULLERTON, ELLIS, and CROW, JJ., concur.

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Statement of Case.

[No. 12667. Department Two. August 11, 1915.]

E. W. GRIFFIN, *Respondent*, v. UNION SAVINGS AND TRUST
COMPANY, *Appellant*.¹

CORPORATIONS—REPRESENTATION—CONTRACTS—OFFICERS—PERSONAL LIABILITY—EVIDENCE—AMBIGUITY—PAROL EVIDENCE. Where a guaranty of the payment of drafts was written on the letter-head of a bank showing the names of its officers, and was signed "O. B. Woolley, manager," but contained nothing to show that the bank was bound, it is *prima facie* the personal undertaking of Woolley on the theory that "manager" was only *descriptio personae*; but the fact that it was written upon the letter-head and the word "manager" attached, creates sufficient ambiguity to admit of parol evidence to overcome the presumption, the burden being upon plaintiff in an action on the guaranty.

SAME—REPRESENTATION—CONTRACTS—OFFICERS—PERSONAL LIABILITY. The fact that the manager of a bank had no authority to guarantee drafts on behalf of the bank, is some evidence that he did not intend to bind the bank in giving a guaranty on a bank letter-head and appending his official title of "manager" after his signature.

GUARANTY—CONSIDERATION—EVIDENCE—SUFFICIENCY. Consideration moving to a bank for a guaranty, by its manager, of drafts to be made by a mining company, is not shown by a prior agreement made by the manager with two of the persons interested in the mining company, and who were owners of a mill company that was largely indebted to the bank, whereby such owners agreed, upon selling their interests in the mining company to pay over the proceeds of such sale to the bank or its manager; especially where the existence of such agreement was kept secret from the bank's officers, and was not mentioned in the guaranty, and the guaranty was not given because of it.

FULLETON, J., dissents.

Appeal from a judgment of the superior court for King county, Albertson, J., entered September 4, 1914, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Reversed.

McClure & McClure (Donworth & Todd, of counsel), for appellant.

Wm. Parmerlee, for respondent.

¹Reported in 150 Pac. 1128.

ELLIS, J.—This is an action to recover the sum of \$2,605.75, the amount of two drafts drawn by the plaintiff, Griffin, on the Chena River Mining Company, payment of which it is alleged was guaranteed by the defendant by a letter of guaranty given to the plaintiff by one O. B. Woolley, who was at that time the manager of the defendant's branch bank at Renton, Washington. The guaranty was written on a letter-head of the branch bank, at the top of which was printed the name of the trust company, the names and the official capacities of its various officers, and Woolley's name, as manager of the Renton branch. The letter was dated at Renton, Washington, June 20, 1912, and, omitting the printed heading, reads as follows:

"E. W. Griffin, Esq.,

"Fairbanks, Alaska.

"Dear Sir: This is to guarantee payment to you for any and all drafts drawn by the Chena River Mining Co. upon themselves for an amount not exceeding five thousand—\$5,000.00—dollars. Said drafts are for work to be done on their property between the dates of September 1st, 1912, and June 1st, 1913.

Yours truly,

"O. B. Woolley, Manager."

None of the officers of the defendant had any knowledge of the giving of this guaranty, nor any knowledge of Woolley's relations to the mining company.

The circumstances leading up to the giving of the guaranty are briefly these: Griffin, Struthers, Hightower and Woolley, owned the majority of the capital stock of the Chena River Mining Company and were desirous of developing the claims held by that company in Alaska. Woolley was secretary and treasurer of the company with a prospective salary of \$6,000 a year. Griffin was a merchant operating a store in the vicinity of the claims, and while in Seattle on his way to Alaska from a trip to the east, he was approached by Struthers and requested to act as Alaska agent for the mining company and to advance funds to

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finance the development of the claims. Griffin refused to do this unless indemnified. While Griffin, prior to this time, had no acquaintance with Woolley and claims that he did not know Woolley had any interest in the mining corporation, it seems that he did know that Struthers and Hightower were doing their banking business with the Renton branch of the defendant. Upon being asked by Struthers if the bank's guaranty would be satisfactory to him, he replied in the affirmative. Griffin testified that, on the day he left for Alaska, he telephoned to Woolley at Renton that he wanted the guaranty before leaving. He did not testify that he told Woolley that he required the bank's guaranty or that a personal guaranty would not suffice. Later in the day, Woolley brought to Griffin in Seattle the guaranty above set out, saying as he handed it to him: "Here is this guaranty." Touching what occurred at this time, Griffin testified:

"I don't recall the exact words; I could not say; I don't think we had any talk about it; he simply handed it to me; he probably said, 'Here is this guaranty what I was to give you'; I know I telephoned him that day that I was going away and wanted that guaranty before I left and he promised that he would come right down with it that afternoon, so when he came down he simply handed it to me and said, 'Here is this guaranty'; now, that is my recollection of the circumstances in connection with it."

Griffin left the guaranty with one Shallenberger, his agent in Seattle, and returned to Alaska. Thereafter, from time to time, he honored orders drawn on him by the men in charge of the work on the claims, in the aggregate amount of the two drafts in question, and, to reimburse himself, drew the drafts and sent them to Shallenberger for collection. Shallenberger presented them to Woolley for payment, but Woolley withheld payment at that time in order to secure the approval of Struthers, for the reason that the drafts were drawn on the bank instead of the mining company as agreed. Shallenberger finally procured drafts properly

drawn and presented them to the bank for payment. In the meantime, Woolley had been deposed from his position as manager and the bank refused payment. The plaintiff then brought this action to recover the amount of the drafts from the bank. It was tried by the court without a jury. The court found in favor of the plaintiff and entered judgment accordingly. The defendant appeals.

The appellant contends that the contract of guaranty, if intended to bind the bank, was *ultra vires* and void; that Woolley had neither actual nor apparent authority to bind the bank by this guaranty, and that it was respondent's duty to inquire as to Woolley's authority; and finally, that the contract of guaranty was not executed by or on behalf of the bank, but was on its face the personal contract of Woolley alone, which fact could not be disputed by parol testimony. It is obvious that if this last claim be found correct, it will be unnecessary to consider the others.

It is but fair to the trial court to say that this last point was not very distinctly raised in the court below. It was, however, presented by the pleadings, and there was an objection to the admission of the guaranty in evidence on the ground of incompetency. The question is presented and argued in the briefs on both sides, and the respondent has raised no objection to its consideration here on the ground that it was not sufficiently presented in the court below. We must, therefore, consider it.

It will be noted that the writing itself presents nothing whatever to indicate any connection of the bank therewith, except the fact that it is written upon its letter-head and that the word "manager" is appended to Woolley's signature. The respondent contends, and the trial court seems to have entertained the view, that these two circumstances establish as a fact that Woolley was acting in his capacity as manager and intended to bind the appellant by this guaranty.

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The only decision cited as supporting this theory is *People's Bank v. National Bank*, 101 U. S. 181. In that case the guaranty was written below one of the defendant's letter-heads and was signed "M. D. Buchanan, Vice-President." In the guaranty, occurred the following language:

"In accordance with your telegram I herewith hand you ten notes of \$5,000 each, &c., . . . We debit your account \$50,000. . . . This bank hereby guarantees the payment of the principal sum and interest of said notes."

The notes were also indorsed:

"Pay to the order of the People's Bank of Belleville. Henry E. Picket. This bank hereby guarantees the payment of this note, principal and interest, at maturity. M. D. Buchanan, Vice-President Manufacturers' National Bank of Chicago."

The words, "This bank hereby guarantees," found in both the separate guaranty and in the indorsement, show beyond question that the signer, however defectively the form of his signature expressed that purpose, intended to bind the bank and not himself personally. This alone is sufficient to distinguish the case from that before us. But in addition to this, it also appears that the guaranty was given with the knowledge and consent of the president and cashier of the bank, both of whom were directors, as was also the vice president who signed it. Moreover, the plaintiff's account with the defendant was debited with the full amount of the face of the notes, the defendant thus receiving and retaining the full benefit of the transaction. The court, of course, held that the defendant was estopped to deny that the guaranty was its own. The distinction from the case here is too plain to require further comment.

There are many decisions which hold that the words agent, manager, trustee, treasurer and the like, affixed to the signature of the person who executes a simple contract, when the instrument itself does not clearly indicate that it was

made on behalf of some one other than the signer, are at least *prima facie*, mere *descriptio personarum*. *Pershing v. Swenson*, 58 Minn. 310, 59 N. W. 1084; *Hobson v. Hassett*, 76 Cal. 203, 18 Pac. 320, 9 Am. St. 193; *Barker v. Mechanic's Fire Ins. Co.*, 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; *Gavazza v. Plummer*, 53 Wash. 14, 101 Pac. 370, 42 L. R. A. (N. S.) 1. It is now, however, quite generally held, especially as to unsealed instruments, or where, as here, the use of seals has been abolished by statute, that the question is one of intention, and that the word agent, or any other word indicating a representative capacity, affixed to the name of the signer, when the intent cannot be clearly gathered from the recitals of the instrument itself, imports into the instrument such an ambiguity as to permit a resort to extrinsic evidence to determine the true intention of the parties. *Southern Pac. Co. v. Von Schmidt Dredge Co.*, 118 Cal. 368, 50 Pac. 650; *Smith v. Alexander*, 31 Mo. 193; *Hardy v. Pilcher*, 57 Miss. 18, 34 Am. Rep. 432; *Metcalf v. Williams*, 104 U. S. 93. See, also, note to *Gavazza v. Plummer*, *supra*, 42 L. R. A. (N. S.) 16. The statement which more nearly harmonizes with the different shades of meaning conveyed in the various decisions than any other which we have been able to find, and which we conceive to be in consonance with the better reasons, is that found in *Pratt v. Beaupre*, 13 Minn. 187, 190, as follows:

"The rule is, that when words which may be either descriptive of the person, or indicative of the character in which a person contracts, are affixed to the name of a contracting party, *prima facie*, they are descriptive of the person only; but the fact that they were not intended by the parties as descriptive of the person, but were understood as determining the character in which the party contracted, may be shown by extrinsic evidence; but the burden of proof rests upon the party seeking to change the *prima facie* character of the contract."

The following decisions voice the same rule: *Rhone v. Powell*, 20 Colo. 41, 36 Pac. 899; *Lewis v. Mutual Life Ins.*

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Co., 8 Colo. App. 368, 46 Pac. 621; *Keeley Brewing Co. v. Neubauer Decorating Co.*, 194 Ill. 580, 62 N. E. 923.

The last case cited is also further instructive as showing that the mere use of the letter-head of the supposed principal is wholly insufficient to show an intention to charge the principal, or to dispense with the necessity to resort to evidence *aliunde* to establish the real intention. In that case a proposal was written below the letter-head of the decorating company which read, "We propose, etc.," and was signed by the alleged agent in his own name followed by the words "Mfg. Agt. & Supt. of Contracts." The other party, having accepted the proposal, sought, as here, to hold the decorating company on the contract so created. The court said:

"The words 'Mfg. Agt. & Supt. of Contracts,' following the signature of D. E. Livermore, are mere *descriptio personae*. (*Braun v. Hess & Co.*, 187 Ill. 283.) There is, however, enough uncertainty upon the face of the agreement to admit parol proof of who was intended to be bound as principal (*Vail v. Northwestern Life Ins. Co.*, 192 Ill. 567), and the burden of proof was upon the appellant to show that the Neubauer Decorating Company, and not Livermore, was the principal in the contract. The appellant failed to sustain such burden of proof."

We hold that the guaranty here in question was *prima facie* the personal undertaking of Woolley alone, that the fact that it was written under the letter-head of the appellant and Woolley's official title "manager" was appended to his signature created sufficient ambiguity as to his intention to admit of parol evidence, and that the burden of proof was upon the respondent to overcome by competent evidence the *prima facie* import of the instrument.

A careful consideration of the entire record convinces us that the respondent has not sustained this burden. There is not a word of testimony that Woolley himself intended to bind the appellant by this guaranty or that he was ever asked to give a bank guaranty. Griffin did not testify that

he himself ever at any time told Woolley that he wanted a bank guaranty. Though he testified that he did tell Struthers and Hightower that he would accept a bank guaranty, there is no evidence that either Struthers or Hightower ever requested a bank guaranty from Woolley or told him that Griffin had demanded or expected to receive a bank guaranty. There is nothing in evidence raising an implication that Griffin had any reason, because of any antecedent custom or course of dealing with Woolley or with the bank, to rely upon this instrument as binding the bank. He had never had any dealings with Woolley or with the bank, and there is no evidence that Woolley ever gave to any one on behalf of the bank any guaranty of any kind. There is not a single circumstance in evidence having any reasonable tendency to estop the appellant from disputing liability upon this guaranty. It received no benefit from it, and there is no competent evidence that it was intended, either by Woolley or by any one else, that it ever would receive any such benefit. The evidence is clear that Woolley, as manager of the branch bank, had no actual authority to execute this, or any guaranty on its behalf. While this fact would not be important as binding upon Griffin had the guaranty been so drawn as to be clearly intended to bind the appellant, since Griffin would then have had the right to rely upon the fact that the giving of such a guaranty was within the apparent scope of Woolley's authority as manager, the lack of actual authority is nevertheless important as bearing upon the question of Woolley's intention in giving the guaranty. The very fact that he had no such authority is some evidence that he never intended to bind the appellant by this instrument, *prima facie* his personal undertaking. *Smith v. Alexander*, 31 Mo. 193.

Another circumstance strongly tending to show that the appellant cannot be bound by this guaranty and that there was no intention on Woolley's part that it should be, is found in the fact that it received no consideration whatever for

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the giving of the guaranty. It does appear that, at the time the guaranty was given, the Orillia Lumber Company, a corporation, doing business in King county, was, and long had been, heavily indebted to the Renton branch of the appellant trust company, and that Woolley, by a system of false bookkeeping, had concealed from the officers and directors of the appellant the existence of a large part of this indebtedness. Struthers and Hightower were the sole stockholders of the Orillia Lumber Company, and Woolley, apparently in the hope of receiving sufficient money from them through a sale of the mining claims to discharge this excess indebtedness, entered into an agreement with them reading as follows:

"This indenture or agreement made and entered into on this 13th day of May, 1912, by and between W. E. Hightower and Fred J. Struthers, each of whom own a one-half interest in the Orillia Lumber Company and are representing the Orillia Lumber Company, a corporation, and as parties of the first part, and O. B. Woolley, duly authorized agent of the Union Savings and Trust Company, a corporation (Renton branch), party of the second part, Witnesseth:

"That as said party of the first part, the Orillia Lumber Company, a corporation, is indebted to the Union Savings and Trust Company in the sum of \$. . . , and that as said Hightower and Struthers are interested in selling their interests in the Chena River Mining Company, a corporation, and expect to receive a large sum of money out of the sale of said mining company, it is hereby agreed: That upon the sale of said mining company, and in consideration and upon payment or payments for the sale of said mining property, that all of the first moneys received for the sale of said property shall be turned and paid over to either the Union Savings and Trust Company, or paid to O. B. Woolley, and that money to be paid to said party of the second part by said parties of the first part or their agents until all of said above sums of money due to said party of the second part shall be paid in full. And it is further agreed: That parties of the first part shall not receive any of the moneys paid in said sale until all of the said sums of money, both principal and

interest, are paid in full and all notes and debts cancelled.

"Witness our hands and the corporate seal of said corporations the day and year first above written.

"(Signed) Orillia Lbr. Co.

"By W. E. Hightower.

"J. Fred Struthers.

"C. B. Woolley."

It is argued that this agreement was made for the benefit of the appellant and that, therefore, it served as a sufficient consideration proceeding to the appellant to sustain the giving of the guaranty here in question. It must be borne in mind, however, that this agreement was entered into sometime before the giving of the guaranty was thought of, and that its existence, as well as the excessive indebtedness of the Orillia Lumber Company to the branch bank, was concealed from the officers of the appellant. Moreover, this agreement was also signed by Woolley personally, and was so worded as to make it of doubtful value to the appellant, except by the grace of Woolley, even had a sale of the mine been made. The guaranty here in question makes no reference to this agreement, and there is not a word of testimony in the record indicating that the guaranty was given because of this agreement, or that this agreement was ever intended to operate as a consideration for the guaranty. We are constrained to hold that the respondent has wholly failed to overcome by any competent evidence the *prima facie* import of the guaranty as that of Woolley alone.

The judgment is reversed, and the cause is remanded with directions to dismiss the action.

MORRIS, C. J., MAIN, and CROW, JJ., concur.

FULLERTON, J. (dissenting).—In my opinion the evidence justifies the conclusion that the guaranty given by Woolley to the respondent was understood to be, and was in fact, the guaranty of the appellant bank, and not the personal guaranty of Woolley. For this reason, I dissent from the conclusion of the majority.

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Syllabus.

[No. 12687. Department Two. August 11, 1915.]

WILLIAM R. HODGEMAN, *Appellant*, v. DONALD B. OLSEN,
Superintendent State Reformatory, Respondent.¹

EVIDENCE—JUDICIAL NOTICE. Judicial notice will be taken of the custom of penal institutions to take and preserve photographs and measurements of prisoners.

REFORMATORIES—REGULATION—IDENTIFICATION OF PRISONERS—POWERS OF MANAGERS—STATUTES. The legislature, by outlining, in broad and general terms (Rem. & Bal. Code, § 8577 *et seq.*), the powers and duties of the board of managers of the state reformatory, without any complete system of specific rules or regulations, has by necessary implication accorded to the officers all those powers which experience has proven necessary, with a wide latitude of discretion; including the power to take and preserve, and send to police officers elsewhere, in good faith, photographs and physical measurements of prisoners, in order to prevent escape and to facilitate recapture, reformation, and the investigation of past records required by statute, and as an aid in enforcing the habitual criminal law.

INJUNCTION—RELIEF—PAST INJURY. It not being the function of an injunction to correct past injuries, injunction does not lie to compel the destruction of photographs taken of a convict, in the absence of an allegation that the defendant is now threatening to make wrongful use of the same.

REFORMATORIES—REGULATION—IDENTIFICATION—RIGHTS OF PRISONERS. When the board of directors of the state reformatory had the power to take and preserve photographs and measurements of prisoners, the taking of the same by their superintendent in charge invades no legal right, although the managers had made no rules or regulations authorizing the same.

MANDAMUS—WHEN LIES—RIGHT. Mandamus only issues against an officer in his official capacity to compel the performance of a duty imposed by law pertaining to his office; hence does not lie to compel the destruction of photographs rightfully taken of prisoners of a reformatory, in the absence of any statute therefor.

CONSTITUTIONAL LAW—CIVIL RIGHTS—RIGHT OF PRIVACY—CONVICTS. The relation of the public to one convicted of crime is such as to forfeit whatever right of privacy the convict may have had with reference to the publication of his photograph, so far as protection to the public is concerned.

¹Reported in 150 Pac. 1122.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered October 24, 1914, upon sustaining a demurrer to the complaint, dismissing an action to compel the destruction of certain photographs and to enjoin the retention and distribution thereof, tried to the court. Affirmed.

Blair & Blinn, for appellant.

The Attorney General and *L. L. Thompson*, for respondent.

ELLIS, J.—In this action the plaintiff seeks to compel the destruction of certain pictures held by the defendant as superintendent of the state reformatory at Monroe, and to enjoin their retention and circulation.

It is alleged that the plaintiff was convicted of grand larceny and sentenced to serve a term of not less than two nor more than fifteen years in the reformatory; that he began serving his term in January, 1912, was paroled in February, 1913, and was granted a full pardon by the governor in January, 1914; that, when he was received at the reformatory, he was compelled by the officers in charge, and against his consent, to submit to the taking of two photographs of himself; and again, on his discharge, to submit to the taking of two other photographs; that the officers in charge of the institution indorsed on the photographs a physical description of plaintiff, including his age, weight, height, color of hair and eyes, and such other information as is usually used in the description of convicts confined in the state penitentiary; that the negative plates of these photographs, with a number of pictures produced therefrom and the indorsements thereon, are in the possession of the defendant as superintendent of the reformatory, and are kept by him as a part of the public records of the institution, open to the inspection of its employees and to others generally; that the defendant and employees of the institution under him, at

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divers times since the plaintiff's pardon, have sent copies of these photographs and the information indorsed thereon to the police department of the city of Vancouver, British Columbia, and to various cities in the state of Washington, causing the plaintiff great humiliation and embarrassing him in his business, and otherwise causing him to suffer irreparable damage; that the board of managers have not by any rule provided for the taking, keeping or circulation of such photographs, and the same is unwarranted by any law of this state. The defendant demurred to the complaint upon two grounds: (1) insufficiency of facts; (2) lack of jurisdiction in the court of the subject-matter. The demurrer was sustained. The plaintiff abiding his pleading, the action was dismissed. He appeals.

Passing, for the nonce, the question of jurisdiction, let us inquire whether the facts stated show any invasion of a legal right. It is conceded that there is no statutory provision expressly authorizing the taking and preservation of photographs of inmates of the state reformatory, but it is urged that this power arises by necessary implication from those expressly conferred. The statute, 2 Rem. & Bal. Code, Title LXVIII, chapter 5, governing the creation and management of the state reformatory, so far as bearing upon the question here involved, contains provisions as follows:

Section 8577 vests in the board of managers the "general charge and supervision" of the reformatory.

Section 8580 empowers the board to appoint as superintendent a person of "the executive ability essential for the proper management of the officers and other employees under his jurisdiction and to enforce and maintain proper discipline in every department."

Section 8590 reads:

"The board of managers shall have the power to make all rules and regulations necessary and proper for the employment, discipline, instruction, education and removal of all prisoners of said Washington state reformatory."

Section 8593 provides:

"It shall be the duty of said board of managers to maintain such control over all prisoners committed to their custody, as shall prevent them from committing crime, best secure their self support and accomplish their reformation. When any prisoner shall be received into the Washington state reformatory upon direct sentence thereto, they shall cause to be entered in a register the date of said admission, the name, age, nativity and nationality, with such facts as can be ascertained of parentage, or early education and social influences as seem to indicate the constitutional defects and tendencies of the prisoner, and the best probable plan of treatment. Upon such register shall be entered quarterly, or oftener, minutes of observed improvement or deterioration of character, affecting the standing or situation of such prisoner, the circumstances of the final release and any subsequent facts of the personal history which may be brought to their knowledge."

It is manifest from these provisions, and indeed from the entire statute, that the legislature has made no attempt to lay down a complete system of specific rules and regulations for the management of the institution or the care and treatment of the inmates, but has only undertaken to outline the powers and duties of the board of managers and superintendent in the broadest of terms. It is obvious that, if these officers were required to look to the statute for specific rules of conduct, they would find none. They would be powerless to inaugurate any adequate system for carrying out the general powers conferred or performing the duties so broadly imposed. The legislature has deemed it inexpedient to attempt any promulgation of specific rules, doubtless because of their necessary manifold scope and because to do so would, on the principle *expressio unius exclusio alterius*, deny to the officers in charge the power to employ those means which practical experience might demonstrate as best calculated to meet the full purpose of the law. It would be practically impossible to enumerate in the statute all of the powers necessary to the management of such an institution

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and the control of its inmates. By conferring general powers and imposing general duties, the legislature has, by necessary implication, accorded to the officers in charge all those powers which experience has proven necessary and such as are customarily employed in the management of penal institutions. In this connection we call attention to the fact that the legislature has been little more specific in promulgating rules for the penitentiary than it has for the reformatory. (2 Rem. & Bal. Code, Title LXVIII, ch. 2.) In both statutes there is left, by necessary implication, a wide latitude of discretionary power to the officers in charge.

It is a matter of common knowledge, of which this court cannot feign ignorance, that the taking and preservation of photographs, physical measurements and characteristics of prisoners is a measure adopted in nearly all penal institutions. This is not only necessary in order to facilitate the recapture of escaped prisoners and the investigation of their past records and personal history, expressly made incumbent by the reformatory statute, but is also necessary to preserve the means of identification for that future supervision after discharge which, by the very theory of reformatory restraint, is assumed by the state for the prisoner's good, as it is for the protection of society in all cases of prisoners discharged from any penal institution whether reformatory or not. The protection of society, whether by reformation or punishment, is the real end in any case. As an aid to the enforcement of our habitual criminal law, the preservation of such data is an obvious necessity. The legislature is also presumed to have had this common knowledge when it passed the reformatory act. By failing to prohibit these commonly employed measures and by imposing general duties to which their use is plainly an appropriate aid, it has, by implication, conferred upon the officers in charge the power to continue their use as a part of the ordinary powers of management. Had such measures been deemed inimical to the benign purpose of the reformatory law, as is strenuously as-

serted by the appellant, the legislature would certainly have so declared.

This implied power is supported by ample authority. In Freund, *Police Power*, p. 102, § 103, we find the following:

“Measures which in their effect reach beyond the term of imprisonment are often especially authorized by statute. This is especially true of processes serving the purpose of identification; the taking of measurements and photographs, copies of which are distributed among other penal institutions and police offices. Since these are appropriate means of making escape more difficult, and of facilitating the recapture of an escaped convict, they may perhaps be regarded as implied in the ordinary powers of management; in a considerable number of states they have, however, in recent years, been made the subject of special statutory enactment.”

In *Owen v. Partridge*, 40 Misc. Rep. 415, 82 N. Y. Supp. 248, the court, sustaining the right of the police department of New-York City to take and exhibit the photograph of a common gambler who had been arrested but not yet convicted, as implied from the express power to “preserve the public peace, prevent crime, detect and arrest offenders” said:

“The first point to be considered is, have the plaintiff’s rights been invaded? The acts of the defendant’s predecessor in office, so far as this plaintiff is concerned, and the defendant’s continuance of them by preserving, exhibiting, or circulating the photograph and measurements, can obviously be justified only as an exercise of the police power. The duty of the police, always existing and reaffirmed by the charter (Laws 1901, p. 136, c. 466, § 315) to ‘preserve the public peace, prevent crime, detect and arrest offenders,’ gives them necessarily a wide range of incidental powers to accomplish the mandate of the statute. The existence of the so-called rogues’ gallery, and the taking of photographs, weights, and measurements, finds its authority, if anywhere, in this provision, or in the accepted pre-existing principles of which it is the expression. So far as habitual criminals are concerned—their supervision and control—no serious question could well be raised as to the propriety or legal character of the acts involved.”

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So, also, in *Shaffer v. United States*, 24 App. D. C. 417, the taking against his will, and use in evidence against him, of a photograph of one accused of crime was held lawful. The court said:

"In taking and using the photographic picture there was no violation of any constitutional right. There is no pretense that there was any excessive force or illegal duress employed by the officer in taking the picture. We know that it is the daily practice of the police officers and detectives of crime to use photographic pictures for the discovery and identification of criminals, and that, without such means, many criminals would escape detection or identification. It could as well be contended that a prisoner could lawfully refuse to allow himself to be seen, while in prison, by a witness brought to identify him, or that he could rightfully refuse to uncover himself, or to remove a mark (mask), in court, to enable witnesses to identify him as the party accused as that he could rightfully refuse to allow an officer, in whose custody he remained, to set an instrument and take his likeness for purposes of proof and identification. It is one of the usual means employed in the police service of the country, and it would be matter of regret to have its use unduly restricted upon any fanciful theory or constitutional privilege."

We refrain from further quotation, but call attention to the following cases equally explicit in affirming the implied police power to take, preserve and make reasonable use of such photographs and data for the identification of persons convicted of crime, and even of persons accused of crime but not yet convicted. *Downs v. Swann*, 111 Md. 53, 73 Atl. 653, 134 Am. St. 586, 23 L. R. A. (N. S.) 739; *State ex rel. Bruns v. Clausmeier*, 154 Ind. 599, 57 N. E. 541, 77 Am. St. 511, 50 L. R. A. 73; *People ex rel. Joyce v. York*, 27 Misc. Rep. 658, 59 N. Y. Supp. 418.

We find it unnecessary to go so far as some of these cases go. We do not hold that any official has the implied power to take and retain the picture and measurements of persons merely accused of crime. That question is not before us. We do hold that those charged with the custody of persons who

have been convicted of crime and incarcerated in our penal institutions have the implied power to take such pictures, descriptive measurements and data, and to retain them for reasonable future use in the detection, apprehension and identification of criminals, and to that end may send such pictures and data to police officers elsewhere in the state when so requested in good faith.

The only decision cited by the appellant touching the real question here is that of the supreme court of Louisiana in *Itzkovitch v. Whitaker*, 117 La. 708, 42 South. 228, 116 Am. St. 215, in which the threatened taking and placing in the rogues' gallery of the picture of one merely accused but not convicted of crime was held properly enjoined. The right, however, in case of a convicted criminal was not questioned. A similar opinion from the same court is presented in *Schulman v. Whitaker*, 117 La. 704, 42 South. 227, 7 L. R. A. (N. S.) 274, but the court adds:

"Whilst expressing the foregoing views, we desire to have it well understood that we are decidedly of opinion that cases may arise justifying the officer in charge of the police department in ordering a picture to be taken; but the necessity must be evident.

"Convicts and hardened criminals may forfeit all rights to consideration, to such an extent, at any rate, that their pictures may be taken if necessary to their identification, and that without much delay.

"The gallery in question should not be broken up; the collection in other cases should remain as it is, although there is no special statute on the subject.

"Law and right have the authority to protect themselves."

This is a clear recognition of all that we hold here.

Existing the implied power to take these pictures and measurements and to retain them for the purposes mentioned, it follows as of course that the facts pleaded show no invasion by the respondent of any legal right of the appellant. As pointed out in the respondent's brief, if we held otherwise it might, with equal reason, be said that persons pardoned

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are entitled to have the records of their conviction and sentence delivered up for destruction lest they might serve to inform the world of the pardoned criminal's past disgrace. The allegation in the complaint of what the appellant conceives to be a past wrongful or abusive use of these pictures, even if the allegation be held sufficient to show such abusive use, is beside the mark. That fact would offer no valid reason for the issuance of a mandate for the destruction of data held under the implied authority of law as a proper part of the records of the institution for a rightful use. Nor does it furnish any ground for the injunction sought. It is not the function of injunction to correct past injuries. 1 High, Injunctions, p. 38.

There is no allegation in the complaint that the respondent is now *threatening* to make any use of these pictures, either wrongful or rightful. \ Since, as we have found, these pictures have been rightfully taken and may be legally held and sent to police officers in this state, when this is done in good faith to aid in the apprehension or identification of criminals, the courts will not enjoin such use to allay the fear of an illegal use which it is not alleged is now threatened. 1 High, Injunctions, p. 37. The alleged fact that the board of managers has made no rule or order authorizing the taking of these pictures is immaterial. Since that board has the power to make such an order, the taking of the pictures by their subordinate in charge, the superintendent, invaded no right of the appellant. We are of the opinion, in any event, that the taking of these pictures was an administrative act within the discretion of the superintendent, in the absence of any statute or rule of the managers prohibiting such action.

Owing to the importance of the principle involved, we have thought it expedient to dispose of the case upon its merits, without regard to the power of the court to grant the particular relief sought. We shall notice this last question but briefly.

The relief sought is of a two-fold nature; mandatory, in that it is asked that the pictures and indorsed data be surrendered for destruction, and injunctive, in that it is asked the respondent be restrained from distributing these pictures to any person or persons.

From what has already been said, it is plain that the court had no jurisdiction to grant the mandate sought. The pictures having been taken under an implied authority of law, and being held as a part of the records of the institution, there is no legal duty on the respondent to destroy them, in the absence of a statute imposing that duty. There is no such statute. The action is brought against respondent in his official capacity. Mandamus will only issue against an officer in his official capacity to compel the performance of a duty imposed by law as resulting from or pertaining to his office. *State ex rel. Rogers v. Jenkins*, 21 Wash. 364, 58 Pac. 217; *Paul v. McGraw*, 3 Wash. 296, 28 Pac. 532. For cases so holding on cognate facts see: *People ex rel. Joyce v. York*, *supra*; *Gow v. Bingham*, 57 Misc. Rep. 66, 107 N. Y. Supp. 1011; *Molineux v. Collins*, 177 N. Y. 395, 69 N. E. 727, 65 L. R. A. 104.

Whether, in any case or on any state of facts, the court would have the power to grant injunctive relief prohibiting the circulation of these pictures, is a more difficult question, but one which we find it unnecessary to decide. It is clear that their distribution to duly constituted police officers and other penal institutions cannot be enjoined. That is one of the purposes of the keeping of such records. [As we have seen in our discussion of the merits of the complaint, such distribution is justifiable as a reasonable police measure for the protection of society. The right of privacy, upon which the appellant insists, if it has any existence in this state, is not invaded by such distribution.] As intimated in the last paragraph of the opinion in *Hillman v. Star Publishing Co.*, 64 Wash. 691, 117 Pac. 594, 35 L. R. A. (N. S.) 595, the relation to the public of one who has been convicted of crime

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is such as to forfeit whatever right of privacy he may be said to have ever possessed. This is true, at least, to the extent that the protection of society requires such forfeiture. See *Molineux v. Collins, supra*. But it does not follow that a wanton distribution of these pictures to persons other than police officers and the like, and for no other purpose than to harass a pardoned criminal and injure him in his business, might not constitute a wrong, an excess of official duty or privilege, for which some remedy might be found. Such, however, is not the case before us. No such wanton or malicious excess of authority is averred, nor any threat of such excess. We think there can hardly be a difference of opinion that no court has jurisdiction to enjoin legal official action where no excess or abuse of authority is threatened.

The judgment is affirmed.

MORRIS, C. J., FULLERTON, CROW, and CHADWICK, JJ., concur.

[No. 12690. Department One. August 11, 1915.]

THE CITY OF HOQUIAM, *Respondent*, v. ARTHUR LENHART
et al., Appellants.¹

EMINENT DOMAIN—BY CITIES—PURPOSES—GARBAGE. Under the express provisions of Rem. & Bal. Code, ch. 17 (§ 7768), a city is empowered to condemn land for garbage incinerators and dumping grounds.

SAME—PROCEEDINGS—PETITION. In condemnation proceedings by a city to acquire a location for garbage incinerators and dumping grounds, it is not necessary to state in the petition that provision has been made for payment of the award; since, by Rem. & Bal. Code, § 7784, possession may be taken only on payment of the judgment.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered October 31, 1914, adjudging a public use and awarding damages in condemnation proceedings, tried to the court and a jury. Affirmed.

¹Reported in 150 Pac. 1196.

Arthur Lenhart, for appellants.

Sidney Moor Heath and *James P. H. Callahan*, for respondent.

CHADWICK, J.—This is a proceeding instituted by the city of Hoquiam to condemn certain property, both within and without the city, to be used as a location for garbage incinerators and as a dump for rubbish, etc. An ordinance was passed declaring it necessary to acquire the property. The property of appellants is situated outside of the corporate limits. Thereafter a petition was filed, setting up the ordinance and declaring in general terms that it was necessary to take the property of appellants for a public use. A demurrer was filed and overruled. The case proceeded to a hearing, after which the court entered a decree of necessity, and set the case down for trial before a jury to assess the value of the land taken and to ascertain the damage, if any, to the remaining property. The jury made an award of \$800 for the property taken, and \$200 as damages to the property not taken.

Appellants raise many questions going to the sufficiency of the preliminary proceedings and to the finding of necessity. They also insist that the city has no authority to condemn for the purposes indicated.

We think their contentions can be explained away by suggesting that they have confused the procedure in this case with that which would have obtained under the eminent domain act. The respondent is invoking the aid of 2 Rem. & Bal. Code, ch. 17 (§ 7768). Under it, power to take land for garbage incinerators and destructors and for dumping grounds is expressly given.

Neither is it necessary, as is contended, to state in the petition that provision has been made for the payment of the award. It is enough that a plan is provided. The property is amply protected by the statute, which permits possession

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only upon payment of the judgment. Rem. & Bal. Code, § 7784 (P. C. 171 § 68).

The question whether a particular piece of property is needed is largely one of fact in all cases, and entirely so in this one. Without reviewing the testimony in detail, we deem it sufficient to say that there is ample testimony to sustain the finding of the trial judge that the property is necessary to the accommodation of a public use.

It is complained that the court erred in the admission and rejection of testimony, in the refusal to give requested instructions, and in permitting the jury to view the premises. We have gone over the record with some care and find no merit in these contentions.

Other assignments are made. We will not discuss them, for our holding upon the main issues, that is, that the city can condemn for the uses intended, and that the property is necessary for the uses intended, put them out of the case.

Affirmed.

MORRIS, C. J., HOLCOMB, PARKER, and MOUNT, JJ., concur.

[Nos. 12779, 12901. *En Banc*. August 11, 1915.]

WILLIAM R. CRAWFORD, *Plaintiff*, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY *et al.*, *Defendants*.

AUGUSTUS S. PEABODY, *as Trustee etc.*, *Respondents*, v. SCOTT CALHOUN *et al.*, *Receivers etc.*, *Appellants*.

PEABODY, HOUGHTELING & COMPANY, *Appellants*, v. SCOTT CALHOUN *et al.*, *Receivers etc.*, *Respondents*.¹

CONTRACTS—WHAT LAW GOVERNS—CONFLICT OF LAWS—INTENT OF PARTIES—PRESUMPTION. Where a contract, the elements of which have their situs in different states, is silent with respect to the governing law, so far as express words are concerned, the intention of the parties controls, as inferred or presumed from the terms of the contract or circumstances attending the transaction; and if the contract be lawful in one state and unlawful in another, a lawful intent will be presumed if possible, and a construction adopted that will render the contract valid.

SAME—WHAT LAW GOVERNS—INTENT OF PARTIES—DETERMINATION. The technical making and required performance of a contract in one state is not controlling of the intention of the parties that the contract was made with reference to the laws of another state, where the elements of the contract had their situs in such other state, and the contract itself was silent as to the governing law.

USURY—WHAT LAW GOVERNS—CONFLICT OF LAWS—INTENT—PRESUMPTIONS. The law of this state, and not the law of Illinois, governs and determines the validity of railway bonds and a trust deed securing the same, which bonds provided for a rate of interest that was legal in this state but illegal under the laws of Illinois, where it appears that the railway company, a Washington corporation, had its only place of business in this state, and signed and acknowledged the trust deed and signed the bonds in this state, pursuant to a tentative agreement made in the state of Illinois, that the bonds were headed "State of Washington," indicating that they were Washington securities, that the purpose of the loan was to promote the company's railway business wholly in this state, and that the trust deed provided notice of a certain option to be published in this state as well as in Illinois, and for the appointment of a new trustee by the superior court of this state; since the elements of the contract, even if to be performed in Illinois, had a situs in this

¹Reported in 150 Pac. 1155.

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state, and the contract being silent as to the intent of the parties respecting the governing law, it will be presumed that a legal contract was intended and such construction adopted as to render it valid.

SAME. The same would be true of contracts and notes executed by the railway company, whereby all the stock of the company was pledged as security for the note indebtedness and deposited with a trustee in the state of Illinois, the duties and obligations of the company and the terms of the contract, and circumstances attending the transaction being substantially the same as under the trust deed and bond contract.

Appeals from orders of the superior court for King county, Frater, J., entered March 13, 1915, determining the claims of creditors in proceedings to wind up the affairs of an insolvent corporation. Affirmed on the appeal of the receivers; reversed on the appeal of Peabody, Houghteling & Company.

Harold Preston, Scott Calhoun, and Preston & Thorgrimson, for appellants *Calhoun et al.*

Peters & Powell and Higgins & Hughes (Hyman Zettler, of counsel), for respondents *Peabody et al.*

Will H. Thompson, in proper person and as *amicus curiae*.

PARKER, J.—There are here involved two separate claims of creditors filed in the superior court for King county in the receivership proceedings of the Seattle, Renton and Southern Railway Company, an insolvent corporation, the affairs of which are being wound up in these proceedings.

The claim of Augustus S. Peabody, as trustee for the holders of the bonds of the railway company, is sought to be made a preferred claim against all of the property of the railway company, by virtue of a trust deed given to secure the payment of the bonds. While this claim is sought to be enforced in the receivership proceedings, the trustee seeks, in effect, the foreclosure of the trust deed as a mortgage, a sale of the property in the hands of the receivers, and the payment of his claim from the proceeds thereof in preference to all other creditors of the railway company.

The claim of Peabody, Houghteling & Company is that of a general creditor and rests upon notes evidencing a loan made by them to the railway company, which loan was secured by the pledging of all of the shares of the capital stock of the railway company by the owners thereof, William R. Crawford and John B. Berryman, as evidenced by collateral agreements executed by the railway company, Crawford, Berryman, Peabody Houghteling & Company, and Augustus S. Peabody, as trustee. These claims were separately heard and determined in the superior court. The claim of Augustus S. Peabody, as trustee under the bonds and trust deed securing them, was allowed by the superior court in full, including interest at the rate specified therein, as a preferred lien upon the property in the hands of the receivers. From the order entered so allowing this claim, the receivers have appealed.

The superior court allowed upon the claim of Peabody, Houghteling & Company only the amount of money they actually parted with in making the loan to the railway company upon its notes, and disallowed all claim for interest as provided for in the notes. From the order so entered upon this claim, Peabody, Houghteling & Company have appealed.

The principal defense made in the superior court by counsel for the receivers against the allowance of these claims, as it is also made here, is that the contracts upon which the claims are rested are usurious under the laws of Illinois, and that such contracts are referable to, and governed by, the laws of Illinois. The superior court rendered its decision as to each claim upon the theory that the contracts were referable to, and governed by, the laws of Illinois; that the interest provided for in the bonds, together with the bonus or discount reserved, was not in amount sufficient to make that transaction usurious under the laws of Illinois; but that the interest provided for in the notes, together with the bonus or discount reserved, was sufficient to make that transaction usurious under the laws of Illinois.

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The highest rate of interest permitted to be contracted for under the laws of Illinois is seven per cent, and when any higher rate of interest is contracted for, with reference to the laws of that state, the whole of such interest so contracted for is forfeited and the lender is entitled to recover only the principal sum so loaned. The learned trial judge concluded that the interest contracted for in the bond transaction, including the bonus or discount reserved, did not exceed seven per cent, but that the interest so contracted for in the note transaction did exceed seven per cent.

We may concede for present purposes that the interest contracted for in the note transaction, together with the bonus or discount reserved, amounted to approximately eight per cent. The interest contracted for in the bond transaction did not in any event exceed seven and three-fourths per cent. The highest rate of interest permitted to be contracted for under the laws of Washington is twelve per cent. Rem. & Bal. Code, § 6251 (P. C. 263 § 3). The main question here for determination is, were these contracts made with reference to the laws of Illinois or the laws of Washington. If the former should be found controlling, it would then be necessary for us to deal with some additional questions. If the latter be found controlling, such fact will dispose of both claims in favor of Augustus S. Peabody, as trustee, and Peabody, Houghteling & Company.

The two appeals are presented here together in the same briefs and by the same counsel. The controlling facts relative to both claims, touching the question of whether the laws of Illinois or the laws of Washington are decisive of the question of usury, are not materially different as we view them. Indeed, counsel do not seem to seriously contend that there is any substantial difference so far as this question is concerned. We shall notice the facts, which are substantially the same as to each claim and which we regard as decisive of each. The Seattle, Renton and Southern Railway Company is a Washington corporation, having its

principal place of business during its entire existence in the city of Seattle. Until the appointment of receivers for it upon its becoming insolvent, it owned and operated a street and interurban electric railway wholly within King county, in this state. It never maintained any agency or place of business outside of this state. Peabody, Houghteling & Company are now, and were at all times here involved, a partnership with their place of business at Chicago. They are purchasers of and dealers in bonds and other securities. Augustus S. Peabody, one of the trustees named in the deed of trust here involved, is a member of the firm of Peabody, Houghteling & Company.

In January, 1908, William R. Crawford, the president of the railway company, went to Chicago for the purpose of negotiating a loan for the railway company in order to make necessary improvements and betterments of its property and refund its outstanding indebtedness. In February, 1908, he entered into a tentative agreement at Chicago, in behalf of the railway company, with Peabody, Houghteling & Company for a loan of a million dollars for the railway company, to be evidenced by bonds of the railway company and to be secured by a trust deed upon all the property of the railway company. We need not here notice in detail the terms of this tentative agreement, since they became merged in the final contract evidenced by the provisions of the trust deed and the bonds issued thereunder. The trust deed and bonds were accordingly prepared by Peabody, Houghteling & Company at Chicago and dated as of May 1, 1908. The trust deed was signed and acknowledged at Chicago by the trustees, First Trust & Savings Bank of Chicago and Augustus S. Peabody, on June 4, 1908. It was then forwarded by Peabody, Houghteling & Company together with \$600,000 of the bonds, to the railway company at Seattle, Washington, where the trust deed was duly signed and acknowledged by the railway company on June 15, 1908, the railway company at the same time signing the bonds so forwarded to it, all in pur-

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suance of resolution of the board of trustees of the railway company made in that behalf. The signed bonds and the trust deed were then forwarded to the trustees at Chicago, where the bonds were delivered by the trustees to Peabody, Houghteling & Company after they were identified by indorsement thereon by the trustees as being bonds secured by the trust deed, such indorsement being made as provided by the terms of the trust deed. Peabody, Houghteling & Company then paid the railway company for the bonds by sending direct to the railway company at Seattle, New York exchange amounting to \$125,804.68; by paying and satisfying outstanding bonded indebtedness of the railway company which had been incurred by it in the course of its business, which indebtedness was evidenced by bonds then at Chicago; and by paying expenses incident to the examination of the railway company's property and the title thereto at Seattle, which became security for the loan under the provisions of the trust deed and the bonds. The remainder of the bonds here involved secured by the trust deed were thereafter signed, delivered and paid for in a similar manner.

We now notice the provisions of the trust deed and the bonds constituting the contract here involved, which we regard as shedding light upon the question of the intention of the parties as to whether they made this contract with reference to the laws of the state of Illinois or with reference to the laws of the state of Washington. The general purpose of the loan is recited in the trust deed as follows:

"Whereas, Said Company desires to borrow money for the transaction of its business and the exercise of its corporate rights and privileges, the refunding of its funded debt and the funding of its unsecured indebtedness, the construction of tracks and the equipment thereof, the extension and improvement of its lines, and for other lawful purposes of its incorporation, and is about to make and issue its first mortgage bonds, of the form, tenor and effect hereinafter set forth, to the aggregate amount of one million dollars."

The trust deed specifies the form in which the bonds shall issue, such form being embodied therein in full. By this provision and as issued, the bonds have a heading in large capital type as follows:

"UNITED STATES OF AMERICA
STATE OF WASHINGTON
"SEATTLE, RENTON AND SOUTHERN
RAILWAY COMPANY
"FIVE PER CENT, FIRST MORTGAGE GOLD
BONDS."

The printed filing form upon the back of the bonds is headed the same. The bonds are, by their terms, payable at Chicago. The bonds refer to the trust deed as security and the provisions thereof as affecting the rights of the bondholders as follows:

". . . to which Trust Deed or Mortgage reference is hereby expressly made for a particular description of the terms and conditions thereof on which the said bonds are issued and secured, for a description of the nature and extent of the security therefor and the rights of the bondholders with regard to such security."

The trust deed requires the railway company to furnish to Peabody, Houghteling & Company monthly sworn statements in detail showing the condition of the company's business and its property. The trust deed provides that the railway company may elect to pay the bonds before maturity and thereby acquires the right so to do. As a prerequisite to the exercise of this right, the railway company "shall publish a notice of its such election and of the date of proposed prepayment in a newspaper of general circulation published in the city of Chicago, state of Illinois, and in a similar newspaper published in the city of Seattle, state of Washington . . ." It is provided in the trust deed that, in the event of the resignation of the trustees, or the rendering of that office vacant for any cause so that there shall no longer be any person to act in that capacity under the trust deed,

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"a new Trustee may be appointed upon the application of the holder or holders of one-eighth ($\frac{1}{8}$) in amount of said bonds then outstanding and unpaid, and upon notice to said company, by the superior court of King county, Washington." For our present purpose, we may regard Augustus S. Peabody as the sole acting trustee under the trust deed here involved.

It is well settled by the authorities that the parties to a contract may make the same with reference to the laws of any state or country and have their contractual rights governed thereby, provided only that such laws have a real and not a mere fictitious connection with the subject-matter of the transaction. It is enough to support this power to contract with reference to the laws of some particular state or country that some of the substantial elements of the contract have their situs in the state or country the laws of which the parties intend to control their rights under the contract. The intention of the parties in this respect may be evidenced by express words in the contract, or may be presumed from the facts and circumstances attending the making of the contract. 9 Cyc. 665, 666; 2 Wharton, Conflict of Laws (3d ed.), §§ 510b, 510c.

Of course, where the residence of all parties as well as every fact and circumstance attending the making of the contract are in one state, the contract is conclusively presumed to have been made with reference to the laws of that state, and the rights of the parties are governed accordingly. In such cases, and in cases of express provision in the contract evidencing the intention of the parties, there is no room for controversy as to their intention. It is where the contract is silent on that subject, so far as express words are concerned, and its elements in some substantial measure have their situs in different states, that the question of what law was intended by the parties to govern their rights thereunder often becomes a difficult one. There is seemingly great conflict in the decisions dealing with this question. Such

conflict, however, is probably more apparent than real and arises from the great number of varying circumstances attending the contracts involved in different cases. Indeed, so marked is this variation of circumstances with which the courts have been called upon to deal, that it seems quite impossible to formulate rules applicable alike to all cases. In 2 Wharton, Conflict of Laws (3d ed.), § 510c, the learned author observes:

“When the intention of the parties with respect to the governing law is not shown by the express language of their contract, it is necessary to infer or presume it from the terms of the contract in connection with the circumstances surrounding the transaction. These terms and circumstances are of such great variety, and susceptible to so many different combinations, that it is impossible to formulate any rules or set of rules for ascertaining the unexpressed intention of the parties that will cover every case. Each case must therefore depend, to a considerable extent, upon its own circumstances. Certain combinations of terms and circumstances, however, are of such frequent occurrence that they have become the basis of formulated principles or rules for ascertaining the bona fide intention of the parties. Each of these rules rests upon an inference or presumption as to the intention of the parties, drawn from one or more of the terms of the contract, or circumstances of the transaction. It is obvious, therefore, that it is not a hard and fast rule (like the rule, for instance, that the *lex rei sitae* determines the requisites of an acknowledgment of a deed of real property), but yields to additional circumstances indicating an intention contrary to the inferred or presumed intention on which it rests. It follows, therefore, that these rules are merely prima facie, and that one may give way to another as additional circumstances appear, or that all may yield to circumstances which have never become the basis of a formulated rule, but which nevertheless rebut the presumptions upon which the formulated rules rest.”

The problem here involved, as we view it, is to a considerable extent freed from its seeming involved nature when we are reminded that it is a question of fact rather than one of

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law, and that all of the rules applicable thereto have to do with presumptions of fact and not with presumptions of law; since we are not dealing with a case where it can be said, as a matter of law, that the parties intended the laws of any particular state to govern their contractual rights, as when all the elements of the contract have their situs in one state. It would seem unnecessary to review the authorities here to show that they regard the intent of the parties as paramount in controlling the question of what law governs in cases of this nature. The following, among numerous authorities, are worthy of notice as evidencing this main thought in that great number of cases having to do with the intention of the parties, other than expressed intention, and that intention which follows as a matter of law when all the elements of the contract have their situs in one state. In 5 R. C. L. 938, the learned editors state the general rule, with numerous authorities cited in support thereof, as follows:

"Fortunately the conflict between the various rules and theories that have been stated is more apparent than real. The majority of them can be reconciled by the application of another rule, namely that the true test for the determination of the proper law of a contract is the intent of the parties, and this intent, whether express or implied, will always be given effect"

See, also, *Mayer v. Roche*, 77 N. J. L. 681, 75 Atl. 235, 26 L. R. A. (N. S.) 763; *Richards v. Globe Bank*, 12 Wis. 773; *Wilson v. Lewiston Mill Co.*, 150 N. Y. 314, 44 N. E. 959, 55 Am. St. 680; *Jackson v. American Mortgage Co.*, 88 Ga. 756, 15 S. E. 812; 39 Cyc. 897; see note in 62 L. R. A. 33.

If we are correct in assuming that this contract has the situs of substantial portions of its elements both in Illinois and in Washington, so as to enable the parties thereto to make the same with reference to the laws of either state, then there comes to our aid in our search for the intention of the parties the presumption of lawful intent on their part in the

making of the contract, and also the rule that the contract will, if possible, be given that construction which will render it valid. In 2 Wharton, Conflict of Laws (3d ed.), § 507, after noting circumstances attending the making of contracts which point to the intent of the parties touching the governing law thereof, such as their residence, the place of making and performance of the contract, etc., where the question of usury is involved, the author says:

“More reasonable is the view maintained by Savigny, and substantially adopted by Mr. Parsons, that when there are two conflicting laws bearing on this point, that law will be adopted by which the validity of the obligation is best sustained. The applicability of a local law, it is argued, is based on the presumed consent of the parties; but parties cannot be presumed to consent to a local law by which their engagements would be made null.”

In *Mott v. Rowland*, 85 Mich. 561, 48 N. W. 638, dealing with the question of usury, where the written obligation might have been made with reference to the laws of either of two different states, the court said:

“It cannot be presumed that the parties intended to enter into an illegal contract. The presumption is rather in favor of its validity. The law will presume an honest intention, unless there is something in the nature of the transaction or in the proofs to establish the contrary. Transactions of this kind were and are now common between citizens of the western and those of the eastern states. The parties had an undoubted right to adopt the law of either state, provided they did so in good faith.”

In *Green v. Northwestern Trust Co.*, 128 Minn. 30, 150 N. W. 229, 231, dealing with the question of interest contracted for, which would be usurious under the laws of one state and not under another, and the contract evidencing the obligations might have been made with reference to the laws of either state, the court observed:

“When the circumstances determinative of the governing law are equivocal, and the determination of what the govern-

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ing law is must be made by resorting to the presumed intent of the parties as to what law shall govern—that of one state which leaves the transaction valid or that of the other which makes it usurious and illegal—a strong presumption is indulged that the intent was to contract with reference to the law of the state where the transaction is valid; and the presumption in a particular case may be conclusive.”

In *Commercial Bank v. Auzé*, 74 Miss. 609, 21 South. 754, dealing with a similar question, the court said:

“A presumption will never be indulged that a contract is in violation of law when it is capable of any other reasonable construction.”

In the text of 39 Cyc. 899, on the subject of usury, the rule is stated, with numerous cited authorities in support thereof, as follows:

“Every presumption is against an intention to violate the law. Therefore where the several elements of a contract have their *situs* in different states, if by the laws of one of the states the contract would be legal, but illegal by the laws of the others, then the parties will be presumed to have contracted with reference to the law of the place wherein the transaction would be valid rather than in view of the law by which the transaction is illegal, always providing there is no evidence of bad faith, or of any intention to evade the usury laws of the latter state.”

In *Pritchard v. Norton*, 106 U. S. 124, 137, Justice Matthews, speaking for the United States supreme court touching the intention of the parties to a contract, not involving the question of usury, however, observed:

“Phillimore says (4 Int. Law, 469): ‘It is always to be remembered that in obligations it is the will of the contracting parties, and not the law, which fixes the place of fulfillment—whether that place be fixed by *express words* or by *tacit implication*—as the place to the jurisdiction of which the contracting parties elect to submit themselves.’

“The same author concludes his discussion of the particular topic (4 Int. Law, § 654, pp. 470-471) as follows: ‘As all the foregoing rules rest upon the presumption that the obligor

has voluntarily submitted himself to a particular local law, that presumption may be rebutted either by an express declaration to the contrary, or by the fact that the obligation is illegal by that particular law, though legal by another. The parties cannot be presumed to have contemplated a law which would defeat their engagements.'

"This rule, if universally applicable, which, perhaps it is not, though founded on the maxim, *Ut res magis valeat, quam pereat*, would be decisive of the present controversy, as conclusive of the question of the application of the law of Louisiana, by which alone the undertaking of the obligor can be upheld.

"At all events, it is a circumstance, highly persuasive in its character, of the presumed intention of the parties, and entitled to prevail, unless controlled by more expressed and positive proofs of a contrary intent."

It would seem, then, that where a contract might have been made by the parties thereto with reference to the laws of either one of two or more states, which contract is silent upon the subject of which laws shall govern the rights of the parties thereunder, so far as express language is concerned, and there is fair room for argument that it might have been made with reference to the laws of either state, the presumption of lawful intention on the part of the makers of the contract should be controlling and result in giving the contract that construction which will make it lawful rather than that which will make it unlawful. This court in *Pennsylvania Mortgage Inv. Co. v. Simms*, 16 Wash. 243, 47 Pac. 441, in harmony with this view, said:

"Elementary rules require that such a construction should be given to the contract as will give it force, rather than one which will make it of no effect;" though that case did not involve a question of conflict of laws.

Counsel for the receivers contend that this is wholly an Illinois contract because, as they insist, it was made there and performable there. Application of technical rules of law might lead to these conclusions; though there is, in the light of all the facts, fair argument to be made in support of the

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view that the contract was partly made in Washington and at least some of its requirements were to be performed there, when we consider the provisions of the trust deed as well as the provisions of the bond. However, we do not think the technical making and required performance of the contract in Illinois is controlling of the intent of the parties, nor as to their right to make the contract with reference to the laws of Washington, in view of the elements of the contract having their situs in this state. We think this contract must be considered as evidenced not only by the bonds, but by the trust deed in connection therewith. The bonds make such reference to the provisions of the trust deed as to make this evident.

We then have the following facts pointing to an intention of the parties in the making of the contract to have their rights thereunder governed by the laws of the state of Washington: The railway company, the maker of the trust deed and bonds, is a Washington corporation with its only place of business within this state. It never maintained any place of business outside the state. It signed and acknowledged, and in that sense, executed the trust deed in the state of Washington. It signed, and in that sense, executed the bonds in the state of Washington. As recited in the trust deed, the purpose of the loan was to promote the business of the railway company, manifestly largely if not wholly in the state of Washington. The heading of the bonds, as well as the filing form indorsed thereon, recited, among other things, "STATE OF WASHINGTON," thus apparently identifying them as Washington securities. The railway company, by the terms of the trust deed, was to furnish data to Peabody, Houghteling & Company monthly touching the condition of its business here, evidently to the end that they might at all times be informed of the condition thereof. The contract in giving the railway company the right to pay the bonds before maturity at its election, provided that the election of such right should be exercised by publication in a newspaper in the state of Washington as well as in one in the

state of Illinois. The trust deed also provided that, in the event of vacancy in the office of trustee with no one to perform the duties thereof, a trustee might be appointed by the superior court for King county, in this state.

We are not prepared to say to just what extent any one of these facts standing alone would influence our decision touching the intent of the parties here in question. But taking them all together, it seems quite clear to us that the contract is one that might have been made by the parties, referable to the laws of the state of Washington, and applying the presumption of lawful intention on the part of the makers of the contract, we are of the opinion that the scale is turned in favor of the view that the contract was in fact made with reference to the laws of this state. This view renders the contract valid, and we are quite clear is preferable to one which would render the contract void, as it would be if held to be referable to the laws of Illinois.

We have noticed the authorities with a view of ascertaining general principles applicable, rather than with a view of finding cases dealing with the same state of facts as we have here, since, as has been suggested, and as has been rendered evident by our search of the cases, each case must be determined largely upon its own facts. Expressions are found in the decisions, especially in the earlier ones, to the effect that a contract is enforceable by the laws of the state of its execution or by the law of the state of its performance, but such expressions are not without qualification. The decision of this court rendered in *Bank v. Doherty*, 42 Wash. 317, 84 Pac. 872, 114 Am. St. 123, 4 L. R. A. (N. S.) 1191, is of some interest in this connection. In that case the mortgage and note involved were both executed in the state of Montana, between residents of that state, the debt being payable there. While the contract was usurious under the laws of the state of Washington, where the mortgaged land was situated, it was not usurious under the laws of the state of Montana. The presumption that the contracting parties were intending to

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act lawfully was manifestly of some weight, inducing the court to reach its conclusion that the contract was made with reference to the laws of the state of Montana, though that was probably not the controlling consideration. Our conclusion here reached is not out of harmony with the conclusion there reached.

We have stated, with reference to the bond transaction, only those facts which are in substance the same as the facts with reference to the later note transaction. The only substantial difference, so far as we have stated the facts, is that the later note transaction, instead of resting upon a trust deed, rests upon contracts entered into between the railway company, Peabody Houghteling & Company, Augustus S. Peabody, a member of that firm, as trustee, William R. Crawford and J. B. Berryman, owners of all the stock of the railway company; in pursuance of which contracts the notes were issued to and paid for by Peabody, Houghteling & Company in substantially the same manner as the bonds were issued and paid for. Under those contracts, all of the stock of the railway company, the same being owned by Crawford and Berryman, was pledged by them as security for the payment of the note indebtedness, the same being deposited with Augustus S. Peabody, as trustee, the contracts giving the trustee a voice in the affairs of the railway company in behalf of Peabody, Houghteling & Company to a certain extent, as if they were stockholders therein. The duties and the obligations of the railway company under those contracts were substantially of the same nature as under the trust deed and bond contract. The notes were signed by the railway company in the state of Washington, the company had the privilege of paying the notes before maturity, and, in the exercise of that privilege, were required to publish a notice of their election in a newspaper in the state of Washington, as well as in the state of Illinois, as in the bond contract. The office of trustee, should it become vacant and there be no one to perform the duties thereof, by the terms of that

contract could be filled by appointment by the superior court of King county, in this state.

We think these contracts and the notes issued in pursuance thereof contain as convincing evidence of the intent of the makers thereof to have made the same with reference to the laws of the state of Washington, as do the trust deed and bond contract. What has already been said in reference to the law of that contract is applicable to these contracts, and we are of the opinion that they were made by the parties thereto with reference to the laws of the state of Washington, where they are valid.

We conclude, therefore, that the order of the superior court allowing the claim of Augustus S. Peabody, trustee, upon the bonds in full, with interest as therein specified, should be affirmed, and that the order of the superior court allowing the claim of Peabody, Houghteling & Company, upon the notes should be set aside, with direction to enter an order allowing that claim in full, with interest as specified in the notes. It is so ordered, and that case is remanded to the superior court for further proceedings in accordance with our views herein expressed.

This disposition of the two causes renders it unnecessary for us to notice other questions raised in the briefs.

MORRIS, C. J., MOUNT, MAIN, HOLCOMB, ELLIS, FULLERTON, and CROW, JJ., concur.

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[No. 12517. Department One. August 12, 1915.]

C. B. SEIDELL *et al.*, Respondents, v. E. W. R. TAYLOR
et al., Appellants.¹

PARTNERSHIP—ACTIONS BY PARTNERS—TORTS—INJURY TO BUSINESS—COMPLAINT—SUFFICIENCY. A complaint on behalf of a partnership conducting a bakery business, alleging an assault upon the two members of the firm, in their place of business, in the nature of a public brawl, resulting in injury to the partnership business through the loss of reputation and the entire patronage of the business, states a cause of action entitling the partnership to relief, rather than a right of action personal to each member assaulted.

ACTIONS—MISJOINDER OF CAUSES—COMPLAINT—BY PARTNERS—ELECTION. Where an assault upon two members of a partnership in their place of business was in the nature of a public brawl, incapacitating the members of the firm from conducting the business and resulting in injury thereto through the entire loss of patronage, a complaint seeking no damage except that resulting in damage to the business of the firm does not state two causes of action because of alleging the personal assault upon the members; and but one cause being alleged, there was no necessity of an election.

PARTNERSHIP—ACTIONS BY PARTNERS—TORTS—LOSS OF GOOD WILL—EVIDENCE OF VALUE. In an action for the loss of the good will of a partnership business through an assault upon the members of the firm amounting to a public brawl upon the premises and resulting in entire loss of patronage, the value of the good will is sufficiently established by evidence showing, in considerable detail, the manner of carrying on the business, and its receipts, expenses, and profits for some time prior to the assault; especially as damages from a wilful, malicious tort need not be measured with any degree of nicety.

Appeal from a judgment of the superior court for Benton county, Holcomb, J., entered May 11, 1914, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages. Affirmed.

Linn & Boyle for appellants.

McGregor & Fristoe, for respondents.

¹Reported in 151 Pac. 41.

PARKER, J.—This is an action for damages, claimed as the result of the defendants' wrongful act causing the loss of the plaintiffs' business to them. The trial in the superior court resulted in verdict and judgment in favor of the plaintiffs for the sum of \$750, from which the defendants have appealed.

The nature and ground of respondents' claim is set forth in their complaint, after alleging their partnership, as follows:

"That on or about the first day of December, 1912, the plaintiffs herein leased from the defendants a sales room, bake room and bake oven and purchased the equipment and business of the 'Quality Bakery' then being conducted in said rooms in Prosser, Washington, and thereafter until the 31st day of August, 1913, personally conducted a general bakery business at said place.

"That with careful personal management and diligent labor, plaintiffs steadily increased said business after entering upon the same until on the said 31st day of August, 1913, they had an established business worth the sum of two thousand dollars.

"That on the aforesaid 31st day of August, 1913, the defendants entered the plaintiffs' said place of business, and the defendant E. W. R. Taylor aided and assisted by the defendant May Taylor, viciously assaulted the plaintiffs and each of them and did strike, beat, bruise, maltreat and injure each of said plaintiffs with a heavy iron instrument thereby rendering them both unable to carry on or conduct said business or serve their customers with goods thereafter; that when said assault was committed as aforesaid the defendants thereby created in said place a public brawl and a bloody fight which attracted the attention of great numbers of people, and thereupon said place became known as the place where said fight occurred, and because thereof plaintiffs' customers and the people of Prosser and vicinity generally avoided said place of business so that it became impossible to conduct a bakery business successfully on said premises.

"That by reason of plaintiffs' injuries aforesaid the plaintiffs were unable to serve their customers, and by reason of

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their said place of business becoming marked as aforesaid, as the place where said assault and fight occurred, plaintiffs immediately lost their entire patronage and their business thereby became ruined, all to their loss and damage in the sum of \$2,000."

It is first contended by counsel for appellants that this complaint does not state facts constituting a cause of action. The argument seems to be that, since it is an action seeking recovery of damage caused to the partnership, such damage cannot result from a mere assault upon the members of the partnership, but that the only cause of action resulting therefrom, if any, is personal to each member assaulted. We think, however, that, in view of the nature and place of the assault as alleged, it being in the nature of a public brawl in the place of business of the partnership and resulting in injury to the partnership business, the facts alleged do constitute a cause of action entitling the partnership to relief as such. We are of the opinion that the trial court did not err in overruling appellants' demurrer to the complaint.

It is also contended in appellants' behalf that the complaint, in any event, states two causes of action, and that the trial court erred in denying their motion to require respondents to elect as to which one they would proceed to trial upon. Counsel argues that:

"The plaintiffs' complaint is based upon two entirely different theories. One, trespass by force and arms, committed against the persons of plaintiffs in consequence of which they were incapacitated and rendered unable to wait on customers so that they lost their patronage. The other, the creation of a nuisance in plaintiffs' place of business which caused plaintiffs' customers to avoid said place so that plaintiffs lost their patronage."

It is plain from the allegations of the complaint that whatever damage resulted to respondents' business was caused by one act of appellants. It might be that, had the assault been made away from respondents' place of business, resulting in personal injury to one or both defendants, that their

damage would not be measurable as the damages here sought are. But since the personal injury to respondents resulted from an assault in their place of business, which assault was in effect a public brawl causing damage to their business, and respondents are seeking no damage except that resulting to their partnership business, we think, that, in so far as the personal injury resulted in damage to their business because of their inability to attend to it following the assault, that element of damage does not constitute a cause of action separate from such damage as may have been otherwise caused, as alleged. Our decision in *Davies v. Rose-Marshall Coal Co.*, 71 Wash. 560, 129 Pac. 98, lends support to this view. That case involved different acts of concurring negligence causing the one injury. We conclude that there is only one cause of action. It follows that there was no election to be made.

In the trial of the case, and in its instructions given to the jury, the court, in effect, confined respondents' measure of damage to loss of the good will of their business. It is not claimed that they lost any tangible property. That the good will was at the time of very substantial value and that it was lost because of appellants' willful, wrongful act, as alleged in their complaint, was abundantly proven by the evidence. It is contended that the evidence wholly failed to show the value of the good will. The evidence showed the manner of carrying on the business, its receipts, expenses and profits for some time prior to the assault, in considerable detail. While the value of the good will cannot be measured thereby with any great degree of exactness, we are to remember that it was caused by a malicious willful act of appellants, and that in such case damages need not be measured with any degree of nicety, as said by Chief Justice Johnson in *Burckhardt v. Burckhardt*, 42 Ohio St. 474, 499, 51 Am. Rep. 842:

"Where there is fraud or other intentional wrong, there is not the same strictness to exclude remote or uncertain dam-

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ages, even though punitive damages are not involved. We think the case at bar one of willful wrong, and that the language of Christancy, J., in *Allison v. Chandler*, 11 Mich. 552, is applicable. He says: "The nature of the case is such as the wrong-doer has chosen to make it; and upon every consideration of justice, he is the party who should be made to sustain all the risk of loss which may arise from the uncertainty pertaining to the nature of the case and the difficulty of accurately estimating the results of his own wrongful act." "

We think that the case does not call for further discussion. The judgment is affirmed.

MORRIS, C. J., CHADWICK, MOUNT, and CROW, JJ., concur.

[No. 12469. Department One. August 13, 1915.]

J. R. SPONOGLE, *Administrator, Appellant*, v.

EMMA SPONOGLE, *Respondent*.¹

GIFTS—DELIVERY—DEED AND BILL OF SALE. Where a deed and bill of sale from a husband to his wife was delivered to her as a gift at the time of execution, there is a sufficient delivery to support the gift without manual delivery of the property.

HUSBAND AND WIFE—COMMUNITY PROPERTY—GIFT TO WIFE. By Rem. & Bal. Code, § 8766, a conveyance of community property from husband to wife makes it her separate property.

EXECUTORS AND ADMINISTRATORS—PROPERTY SUBJECT TO ADMINISTRATION—APPLICATION TO DEBTS. Where a widow, believing in good faith that all of the estate had been given to her, used her own money, together with community funds on deposit in a bank constituting the entire community estate, to pay the debts of the estate and funeral expenses, which exceeded the amount of the deposit, the deposit is not subject to administration at the suit of an heir, all debts having been paid; since it was applied as the law requires it to be applied.

Appeal from a judgment of the superior court for Kitsap county, French, J., entered March 5, 1914, upon findings in

¹Reported in 151 Pac. 43.

favor of the defendant, in an action by an administrator to recover property as assets of an estate. Affirmed.

W. A. McLeod and McCafferty, Robinson & Godfrey, for appellant.

C. D. Sutton and Hastings & Stedman, for respondent.

PARKER, J.—The plaintiff, suing as administrator of his father's estate, seeks to recover from the defendant, his step-mother, certain property claimed by him as belonging to the estate of his father, which property she claims as her own. Findings and judgment were rendered in favor of the defendant, from which the plaintiff has appealed.

A day or two before the death of J. D. Sponogle, he conveyed by deed and bill of sale, duly executed and delivered, all of his real and personal property to his wife, this respondent, except possibly the sum of \$663.77 then on deposit in the Dexter Horton Bank of Seattle. He had theretofore stated, in the presence of several witnesses, his intention to give all of his property to his wife, since he had provided for his children. He was then about sixty-three years old. All of the property in which he then had any interest was the community property of himself and respondent. It is plain from the evidence that he then also intended to convey to his wife the money on deposit in the Dexter Horton Bank, though such conveyance probably failed and became legally ineffective because of want of sufficient description of the bank deposit. We shall, in any event, so assume for present purposes. This deposit was subject to check by either him or his wife. At the time of his death, the community was indebted in approximately the sum of \$1,000 for goods purchased in the operation of a drug store owned by the community situated at Port Orchard, in Kitsap county. Soon after his death, respondent, manifestly acting in good faith under the belief that the conveyance executed by her husband had resulted in her becoming the separate owner of the bank

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deposit as well as all the other property, paid, with this and money of her own, all of the indebtedness of the community, including the funeral expenses of the deceased. Nearly all of this indebtedness was paid before appellant was appointed administrator, which appointment she had no knowledge of until thereafter.

Some contention is made that the conveyances executed by the deceased were ineffectual because of his mental condition at that time. We deem it sufficient to say that we regard the evidence as overwhelming in support of these conveyances, in so far as it touches the mental capacity of the deceased to execute them.

These conveyances were in effect gifts by the deceased to respondent, his wife. Some contention seems to be made on appellant's behalf that they failed for want of manual delivery of the property conveyed. The deed and bill of sale were actually delivered to respondent by deceased at the time of their execution. This clearly was a sufficient delivery to support the gift without manual delivery of the property. 20 Cyc. 1197.

Some contention seems to be made by counsel for appellant that the property is all still community property and therefore subject to administration. It is plain, however, that conveyance of community property by a husband to his wife makes it thereafter her separate property under our laws. Rem. & Bal. Code, § 8766 (P. C. 95 § 47); *Hayden v. Zerbst*, 49 Wash. 103, 94 Pac. 909; *Stewart v. Kleinschmidt*, 51 Wash. 90, 97 Pac. 1105; *Christopher v. Ferris*, 55 Wash. 534, 104 Pac. 818.

It is insisted that, in any event, the money on deposit in the Dexter Horton Bank at the time of the husband's death had not, by the bill of sale, become her separate property, and that therefore it was subject to administration as community property. Under ordinary circumstances, this contention might be considered well founded, but we are of the

opinion that, in the light of the facts before us, respondent should not now be required to account for that money to the administrator. We have seen that she was acting in the best of faith, believing that she was paying the debts of the community with her own money; that appellant procured his appointment as administrator without her knowledge and not until she had so paid nearly all of the indebtedness of the community; that the debts of the community, together with the funeral expenses of the deceased paid by respondent, largely exceeded the amount on deposit which she appropriated as her own and so used. It is also to be noted in this connection that it clearly appears from the record before us that, at the time of the trial of this cause in the superior court, there were no debts whatever of the deceased or of the community unpaid. Indeed, appellant in his own testimony admits this fact. Manifestly this money was applied as the law required, in any event.

We conclude that, in the light of all the facts, the learned trial court properly disposed of the case. The judgment is affirmed.

MORRIS, C. J., MOUNT, CHADWICK, and HOLCOMB, JJ., concur.

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Opinion Per MAIN, J.

[No. 12693. Department Two. August 13, 1915.]

M. C. HAYDEN, *Appellant*, v. W. C. ASHLEY *et al.*,
Respondents.¹

BROKERS—ACTION FOR COMMISSIONS—PROCURING CAUSE OF SALE—EVIDENCE—SUFFICIENCY. A broker, with whom property had been listed for sale, but not exclusively, is not the efficient procuring cause of the sale, and therefore not entitled to commissions from the owner, where it appears that, with the owner's consent, he sent the listing to brokers in Spokane in the hope of effecting a trade, in which, according to custom, such brokers might collect their commission from the other party, but without informing the owner of the manner in which the brokers would adjust their commissions, that one of the Spokane brokers in turn sent the listing to another broker, who produced a customer and closed a deal for the sale or exchange of the property, charging the owner a commission which the owner paid.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered September 26, 1914, upon granting a nonsuit, dismissing an action to recover broker's commissions, tried to the court and a jury. Affirmed.

Moulton & Jeffrey and McCarthy, Edge & Davis, for appellant.

Charles P. Lund, for respondents.

MAIN, J.—The plaintiff brought this action for the purpose of recovering a commission on the sale of real estate claimed to be due him from the defendants. The defendants denied liability. After the issues were framed, the cause in due time came on for trial before the court and a jury. At the conclusion of the evidence introduced on behalf of the plaintiff, the defendant challenged the sufficiency thereof, and moved the court to withdraw the case from the jury and enter a judgment in favor of the defendants. This motion was sustained, and a judgment was entered dismissing the action. The plaintiff appeals.

¹Reported in 150 Pac. 1147.

The facts are as follows: On the 1st day of September, 1911, and for some time prior thereto, the appellant had been engaged in the real estate brokerage business at Lind, Washington. The respondents were the owners of a farm of considerable size located within a few miles of Lind. On the date mentioned, the respondents, in writing, listed their farm for sale with the appellant. This listing provided that, in the event of a sale or trade, the appellant should be entitled to a commission of two and one-half per cent upon the amount for which the farm was disposed of. The listing was not an exclusive one. At the time the listing was made, the appellant informed the respondents that he had a brother engaged in the real estate business in Spokane, and that he would forward the listing to him, as well as to another or other brokers. Thereafter the listing was forwarded by the appellant to his brother, who in turn listed the property with one Larsen, who also was engaged in the real estate business at Spokane. The purpose of sending the listing to Spokane seems to have been to enable brokers there to match up the property, that is, if any broker at Spokane to whom the listing was sent had a client with property to trade, and exchange was made for the farm of the respondents, the Spokane broker would collect his commission from his own client, and the appellant would collect from the respondents. This appears to have been in accordance with a custom which existed among brokers. The respondents, however, were not advised by the appellant as to the method by which, in the event of a trade, the brokers would adjust their commission. They were only informed that the listing would be sent to brokers in Spokane. This appears not to have been disapproved of by the respondents.

During the month of September, 1913, Larsen, with whom the property had been listed, as above indicated, produced a customer for the farm of the respondents, and a deal was closed for the sale or exchange of the property. The respondents thereupon paid to Larsen a commission. The ap-

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pellant did not produce the customer to whom the farm passed, nor did he have anything to do with effecting a transfer to him. After the listing and prior to the time when the deal was closed through Larsen's customer, a number of propositions had been submitted to the respondents by the appellant which were declined. The appellant does not claim that Larsen was his subagent or representative in the deal which was closed. The appellant's position is that, since he selected the agency through which the trade was made, the property has therefore been "traded by him."

Before a broker with whom property has been listed can recover compensation for his services, he must show that he was the efficient cause of procuring the sale. *Elmendorf v. Golden*, 37 Wash. 664, 80 Pac. 264. A broker is the efficient procuring cause of a sale when he produces a customer who is ready, willing, and able to purchase the property which has been listed with him. In *Frink v. Gilbert*, 53 Wash. 392, 101 Pac. 1088, it was said:

"It is a fundamental proposition that a real estate agent who produces a customer who is ready, willing, and able to buy, is entitled to his commission, although the vendor takes the matter in his own hands and sells to another. This rule has been frequently announced by this court [Citing authorities]."

Where property is listed for sale with different brokers, the contracts not being exclusive, the broker who first secures a purchaser who is ready, willing, and able to purchase is entitled to the commission. In *Dalke v. Sivyer*, 56 Wash. 462, 105 Pac. 1031, 27 L. R. A. (N. S.) 195, it was said:

"It is also well settled that, where the owner or agent lists property with different brokers for sale, the contracts not being exclusive, the brokers run a race of energy for the prize, viz., the commission; that they enter into a competition in this respect, and that no matter how much effort or time a broker may have expended in attempting to make a sale, he cannot complain if his competitor reaches the goal

before he does by securing a purchaser who is ready, able, and willing to purchase."

Applying the rules stated to the facts of the present case, we think the evidence was not sufficient to carry the case to the jury. The property having been listed with Larsen by the appellant in the manner stated, the situation was not different from what it would have been had this listing been made by the respondents themselves. If the listing with Larsen had been made by the respondents, it doubtless would not be contended that the appellant had any claim against the respondents for a commission. It would be an extreme and unjust rule which would permit a broker with whom property is first listed to send the listing to other brokers with the consent of the owners, and in the event of a sale by any of the other brokers with whom the property is listed, thus make the owner liable to him for a commission, notwithstanding the fact that he had nothing to do with producing the purchaser with whom the trade was finally made.

Whether or not the appellant has a cause of action against Larsen for a portion of the commission which was paid to him is a question not in this case, and we therefore express no opinion upon it.

The judgment will be affirmed.

MORRIS, C. J., ELLIS, and FULLERTON, JJ., concur.

[No. 12217. Department Two. August 14, 1915.]

THE STATE OF WASHINGTON, *on the Relation of Seattle &
Lake Washington Waterway Company, Plaintiff, v.*
THE SUPERIOR COURT FOR KING COUNTY,
*Respondent.*¹

CORPORATIONS—ACTIONS AGAINST—VENUE—"TRANSACTIONING BUSINESS"—ACTS OF AGENT—PRINCIPAL AND AGENT. A waterway company, having state contracts for filling state tide lands, is not, as between the parties, an agent of a trust company, with whom it contracted for floating the state certificates received in payment of the fills, so as to make its acts under the contract with the trust company (such as sending out notices, making collections and remitting the proceeds, performed in King county) the acts of the trust company, having its domicile and transacting its business in Spokane county; and the trust company is not "transacting business" in King county by reason of the acts of the waterway company in performing such contract, within the meaning of Rem. & Bal. Code, § 206, authorizing a corporation to be sued in any county in which it is "transacting business" at the time; although the trust company's officers were frequently temporarily in King county to consult with the waterway company concerning the certificates; since the contract between them for floating the bonds was an independent contract creating no relation of principal and agent.

Certiorari to review an order of the superior court for King county, Mackintosh, J., entered August 7, 1914, granting a change of venue. Affirmed.

Donworth & Todd, for relator.

Graves, Kizer & Graves, for respondent.

PER CURIAM.—This is a proceeding in review of an order of the superior court of King county granting a change of venue.

The facts are these: Pursuant to the act of the legislature of the state of Washington, approved March 9, 1893 (Laws 1893, p. 241; Rem. & Bal. Code, § 8100 *et seq.*), the commissioner of public lands entered into a contract with

¹Reported in 150 Pac. 1149.

one Eugene Semple for the excavation of certain waterways and for the filling in and raising above high tide of certain tide lands belonging to the state, agreeing, also pursuant to the statute, to issue certificates as the work progressed, showing the actual cost of the work with fifteen per cent added, which certificates, when recorded, should be liens upon the lands so filled. Semple assigned his interest in the contract to the Seattle & Lake Washington Waterway Company, a corporation organized under the laws of the state of Washington and having its office and place of business at Seattle, who undertook the performance of the contract.

To float the certificates when earned and issued, the waterway company entered into a contract with the Spokane & Eastern Trust Company, a corporation organized as a banking and trust company under the laws of the state of Washington, having its banking house and place of business in the city of Spokane. The contract was in writing, and, after reciting that the waterway company had a contract with the state for the excavation of waterways and the filling in of certain tide lands, and would receive certificates for the cost of making such improvements, and that the trust company was desirous of underwriting and taking from the waterway company, upon certain enumerated conditions, such certificates, contained, among others, the following stipulations:

"Now Therefore, it is hereby understood and agreed by and between the parties hereto as follows:

"First: That said party of the first part [The Waterway Company] will proceed with all reasonable diligence and dispatch to fill and raise above high tide under its contract with the State of Washington, Blocks 895, 896 and 898, Seattle Tide Lands, King County, Washington, and will obtain from the Commissioner of Public Lands certificates thereon, in such order and of such denominations as may be found to be most desirable by said party of the first part, and upon receipt of such certificates duly executed, it will cause the same to be recorded in the manner provided by law, and as soon as such record is completed and such certificates

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are returned to it, it will deliver the same, together with an assignment thereof in due and regular form, properly executed, to the said party of the second part [The Trust Company], or to such other party or parties as the second party may in writing direct. And the party of the second part agrees that upon receipt of such certificates and assignment, and each thereof, it will immediately pay to said party of the first part, or its order, for such certificates, at the rate of ninety-five cents on the dollar, par value thereof, together with accrued interest thereon from the date thereof until the date of the payment therefor.

"Fourth: It is hereby further understood and agreed that the said party of the first part shall, if so requested by second party, at its own cost and expense, procure the certificates hereinbefore referred to, and cause the same to be recorded and delivered as aforesaid, and keep a complete record thereof, and send out notices, make collections thereon and remit the proceeds thereof to the said party of the second part. And further, that should default occur in making payments when due upon said certificates, the party of the first part shall, upon written notice from the party of the second part, immediately proceed to collect the same by suit or otherwise, all at the cost and expense of the said party of the first part.

"Fifth: It is further understood and agreed that the said party of the first part shall be governed entirely by the written instructions of the said party of the second part in the matter of receiving and accepting payments in advance of maturity upon any of said certificates.

"Sixth: It is further understood and agreed that the said party of the first part shall and will, at its own cost and expense, do what ever is necessary or desirable for the protection of the liens of said certificates upon the lands for the improvement of which such certificates are issued."

Subsequent to the execution of the last named contract, the waterway company received from the state, for excavating waterways and filling tide lands, certificates of a value in excess of one million dollars, all of which were purchased by the trust company pursuant to the contract, and by the trust company floated among its clients desiring that form

of investment. After the execution of the contract between the state and Semple, the tide lands affected thereby passed from the state into private ownership, and as the certificates matured were taken up for the larger part by the private owners. Certain of these, however, were not redeemed, and were assigned in trust by the investors purchasing them from the trust company to J. P. M. Richards, the president of the trust company, who brought suit in the superior court of King county to foreclose the liens represented thereby. Pending the foreclosure suit, certain of the certificates were redeemed by the owners of the property. A decree of foreclosure was taken by Richards on the others, and the tide land lots sold thereunder. At this sale, certain of the lots were purchased for cash, and the remainder by Richards, as trustee, in satisfaction of the decree.

On April 6, 1914, the waterway company began an action in the superior court of King county against the trust company and J. P. M. Richards, in his individual capacity and in his capacity as trustee, averring that it had interest in the money received from the foreclosure proceedings and in the tide land lots purchased by Richards thereunder by reason (as it is alleged),

“ . . . that ‘when the first installment of principal payable on said certificates and the first annual amount of interest accruing thereon fell due in the months of September and October, 1908, neither the owners of the tidelands covered by said certificates, nor any person interested with said owners paid the said sums then falling due or any part thereof. Thereupon by mutual consent and agreement between the plaintiff and the defendants Richards and Spokane & Eastern Trust Company, the then owner of all said certificates, it was agreed that plaintiff should advance the several amounts then delinquent, on the understanding and agreement that the plaintiff should by making such payment acquire an interest in all of said certificates in such proportion as the amount paid by the plaintiff then bore to the full face value of the principal and interest of said certificates, and

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that said Spokane & Eastern Trust Company should hold in trust for plaintiff the said proportionate interest in said certificates, and thereupon pursuant to said understanding and arrangement, and for the mutual benefit of both parties, the plaintiff on December 4, 1908, advanced to the defendant Spokane & Eastern Trust Company the amount then delinquent on said certificates, namely, one-tenth of the principal thereof and the first year's interest then delinquent, and delinquent interest, the whole amount so paid by the plaintiff to said Spokane & Eastern Trust Company being the sum of \$22,562.81, and thereupon plaintiff became, ever since has been and now is equitably and beneficially a part owner in said certificates and any property and interests resulting therefrom in the proportion determined as aforesaid, to-wit, the equitable and beneficial owner of sixteen and 36-100 per cent. in each and every of said certificates, and all the money, property and other benefit resulting or to result therefrom.'"

The complaint also contained allegations to the effect that the trust company was the beneficial owner of the real property procured in the foreclosure proceedings, and that the money received in virtue of such proceedings had been turned over by Richards to the trust company. Service of summons in the action was made on J. P. M. Richards in King county; Richards being there served in his individual capacity and as trustee, and as president of the trust company. On April 22, 1914, the defendants moved for a change of venue to Spokane county. The motion was based on the grounds that the action had not been begun in the proper county, and that the convenience of witnesses would be forwarded by a change to Spokane county. The motion was supported by an affidavit, to which answering affidavits were filed, which in turn were followed by an affidavit in reply. At the hearing, the claim that the convenience of witnesses would be forwarded was not pressed, but the motion was granted on the ground that the action was not begun in the proper county. This proceeding was brought to review the order.

The trial court concluded from the record:

"(1) That the defendants J. P. M. Richards and J. P. M. Richards, as trustee, reside and did reside at the time of the commencement of this action in the county of Spokane;

"(2) That the defendant Spokane & Eastern Trust Company is not a necessary party to this action;

"(3) That the defendant Spokane & Eastern Trust Company is not transacting business in King county, and was not transacting business in King county at the time of the commencement of this action or at the time the cause of action arose."

In so far as the second of the court's conclusions is concerned, we agree with the relator that it is not well founded. Since, however, the conclusion that the trust company is a necessary party to the action does not in itself require the reversal of the trial court's order, we shall not stop to state our reasons for the holding, but will pass to the controlling question.

The statutes of this state relating to the venue of actions against private corporations provides that,

"An action against a corporation may be brought in any county where the corporation transacts business or transacted business at the time the cause of action arose; or in any county where the corporation has an office for the transaction of business or any person resides upon whom process may be served against such corporation, unless otherwise provided in this code." Rem. & Bal. Code, § 206 (P. C. 81 § 107).

It is conceded in the record, or if not conceded is abundantly proven, that J. P. M. Richards was, at all times during the transactions before mentioned, a resident of the city of Spokane, in Spokane county, and that his presence in King county at the time he was served with summons in the present action was an accidental circumstance. It was abundantly proven, also, that the trust company had its banking house and its place of business in the city of Spokane, in Spokane county, and had no office for the transaction of business in

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King county, the place of suit, nor did any one reside therein upon whom process could be served against it. If, therefore, it can be sued in King county against its will, it is because it was transacting business in that county at the time of the commencement of the action, or transacted business therein at the time the cause of action arose.

The record does not show, and it is not claimed, as we understand it, that the corporation transacted business in King county extrinsic of the matters connected with the purchase of these certificates; but the contention is that, because the written agreement entered into between the waterway company and the trust company required the waterway company to keep a complete record of the certificates issued, send out notices and make collections thereon and remit the proceeds to the trust company, and if default occurred in payments due upon such certificates to collect the same by suit or otherwise on the written notice of the trust company, the waterway company became the agent of the trust company, and that its acts taken in this behalf, together with the acts of the president, the vice president, the manager of the trust company, each of whom from time to time came to King county from Spokane county and consulted with the officers of the waterway company concerning the certificates, constituted a transaction of business within the county of King by the trust company, rendering it liable to be sued in that county by the waterway company.

But it is at once apparent that this is not a case where one company has employed another to transact for it a material part of the employer's business, but is a case where two independent companies, each in pursuit of its own business, have engaged to perform, for the mutual benefit of each, some specific duty with relation to a particular transaction. The waterway company desired to float these certificates. The trust company was in a position to float them, and was willing to do so on certain conditions. The waterway company accepted these conditions, a part of which

consisted in the performance on its part of certain specific duties. In the performance of these specific duties, the waterway company was not, in our opinion, as between the companies themselves, so far acting as the agent of the trust company as to make its acts the acts of the trust company. Undoubtedly, as between the trust company and some third person affected by the acts of the waterway company in its dealings with the certificates subsequent to their assignment to the trust company, the acts of the waterway company would be considered the acts of the trust company on the principle of agency; but clearly, as between the companies themselves, the contract is an independent contract, creating no relation of principal and agent. The waterway company cannot, therefore, claim that its acts thereunder are so far the acts of the trust company as to confer on it rights which it would not otherwise possess. In other words, since the waterway company was obligated under its contract with the trust company to send out notices with reference to the certificates, make collections thereon, and remit the proceeds thereof to the trust company, it cannot claim that its acts in that behalf were the acts of the trust company, for the purpose of conferring on itself the right to sue the trust company in a county other than in the county of its domicile.

Our conclusion is, therefore, that the trust company is not suable in King county against its will on the transaction set out in the complaint, and the order of the trial judge is affirmed.

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Opinion Per MORRIS, C. J.

[No. 12638. Department One. August 16, 1915.]

WILLIAM P. VANORDSTRAND, *Administrator etc., Appellant,*
v. NORTHERN PACIFIC RAILWAY COMPANY, *Respondent.*¹

MASTER AND SERVANT—INJURIES TO SERVANT—VICE PRINCIPAL—ACTS OUTSIDE SCOPE OF EMPLOYMENT. A railway call boy, instructing a new call boy in the matter of his duties in calling a train crew in town about one mile distant up the track, acts outside the scope of his employment, and not as a vice principal, when he directed the new boy to jump on a train going to the town and to jump off while the train was in motion, where call boys were prohibited by rule from riding upon trains and the yard foreman had particularly cautioned the new boy against jumping on or off trains in going to town.

SAME—FELLOW SERVANTS—FEDERAL EMPLOYERS' LIABILITY ACT—SCOPE OF EMPLOYMENT. The Federal employers' liability act making employers liable to their employees for the negligence of fellow servants, applies only to acts of the fellow servants done in the scope of their employment.

SAME—FELLOW SERVANT—SUPERVISION OVER WORK. A fellow servant does not become a vice principal because, for the moment, he assumes to give directions as to the method of doing the work.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered October 9, 1914, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Affirmed.

Green & Chester, for appellant.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, for respondent.

MORRIS, C. J.—Action under the Federal employers' liability act, to recover for the death of a minor son. Appeal from judgment notwithstanding the verdict. No question is raised as to the timeliness of the motion upon which the judgment was granted, as the entry of judgment upon the

¹Reported in 151 Pac. 89.

verdict was deferred by order of the court until after filing and ruling upon the motion for judgment.

Harry Vanordstrand, the deceased, was employed by respondent as a call boy in its Auburn yards, some four or five days prior to his accidental death. Upon being employed, he was placed under the direction of another call boy named Ward, who was directed by the yard foreman to instruct Vanordstrand what his duties were, and how to perform them. The Auburn yard, where the call boys assembled, was about a mile from town, and the duty of the call boys was to go into town when a train was about to be made up and call the crew which was to take it out. It was necessary to instruct new boys where the different members of the crews lived, and how to obtain their acknowledgments of call by requiring signatures in the call book. This was what Ward was teaching Vanordstrand, and what he was directed to teach him by the yard foreman.

On the night of the fatal accident, Ward, Vanordstrand, and a third boy left the yard office at about ten o'clock p. m., to go up town and call a crew. A short distance up the track and headed in the direction of town was a Great Northern passenger train, which started to pull out as the boys came up. The three boys jumped on the train intending to ride to the town station, assuming that the train would stop on reaching the station. The vestibule doors of the coaches were all closed, and the only way the boys could get on the train was by standing on the steps and holding onto the hand holds. Ward jumped on the rear steps of one car, Vanordstrand on the front steps of the following car, with Taylor, the third boy, on a car further back. When the train reached the Auburn station, it was traveling at about twenty miles an hour, and observing it would not stop, the boys jumped. Vanordstrand was fatally injured.

Appellant contends that Ward stood in the relation of vice principal to Vanordstrand, and directed him to board the train and to jump off, and because of this relation, liability

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flows to respondent. This record does not support such a contention. The fact that Ward was instructing Vanordstrand in his duties as call boy would not make him a vice principal in giving instructions to jump on or off the train, since that was no part of his duty. If he gave any such order, it was clearly without the scope of any authority conferred upon him, either directly or by way of inference. Call boys were prohibited by rule from riding upon trains, and the yard foreman of respondent, who employed Vanordstrand, testified that, on account of the friendly relations existing between himself and the Vanordstrand family, he particularly cautioned Vanordstrand against jumping on or off trains in going to or from town.

The facts bring this case within the rule announced in *Reeve v. Northern Pac. R. Co.*, 82 Wash. 268, 144 Pac. 63, L. R. A. 1915 C. 37, where, in speaking of the application of the Federal employer's liability act to cases of this character, it was said:

"Its purpose was not to render the carrier liable in all instances and under all circumstances, where one employee of a carrier is injured by the careless and negligent acts of another. It is not enough that the negligent act causing the injury occur during the existence of the employment, nor is it enough that it occur during the hours the employees are required to be on duty. To render the carrier liable, the negligent act must occur while the employees are doing some act required in the prosecution of the carrier's business."

Citing *White's Personal Injuries on Railroads*, § 227, to the effect that the injury to an employee must not only arise out of, but it must occur in, the course of the employment. *Labatt on Master and Servant*, § 537, announces a like rule, and both texts are supported by *Hobbs v. Great Northern R. Co.*, 80 Wash. 678, 142 Pac. 20, where it is said:

"The rule of liability against a railway company engaged in interstate commerce is predicated upon the duty of the company to furnish its servant with a reasonably safe place

in which to perform the work it requires of him, or while he is about those places which are incident to his work, and this duty is incident to all places where the employee must necessarily be in connection with his employment. But that duty is not incident to places where a servant is not required to be, nor expected to be, in the performance of his work. Nor does it cover the servant when he is not within the scope of his employment or doing some act which is not incidental to his employment. This rule is sustained by all the authorities, and the Federal act in no wise attempts to change it."

These boys were not upon this train in the discharge of any duty required by the railway company. It was neither an incident to their employment nor was it a place where it should be reasonably anticipated they might be, but on the contrary, the place was one where they had no business to be, and where they were expressly prohibited from being.

Assuming that Vanordstrand jumped on and off the train at the suggestion of Ward, such a suggestion would not make Ward a vice principal. A fellow servant does not become a vice principal because for the moment he assumes to give direction as to the method of doing the work. Disposing of a like contention in *Beck v. International Harvester Co.*, 85 Wash. 413, 148 Pac. 35, it was said:

"It may be true that, in the process of the work, Bittinger assumed to give such directions as were necessary to secure concert of action. But this does not make him the representative of the master. As we said in *Ponelli v. Seattle Steel Co.*, 64 Wash. 269, 116 Pac. 864:

"To hold that every time one servant suggests a plan for doing the work, or calls upon another servant to do something which in his judgment will facilitate the work, in making the suggestion or in directing the other servant, he becomes a vice principal and fixes a liability upon the master for any injury incurred in following the suggestion, or in accepting the direction where the duty of superintendence had not been intrusted to him by the master, would be to go further than any case with which we are familiar, and announce a new rule with no legal principle for its support'."

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Opinion Per MOUNT, J.

There being neither law nor fact upon which the verdict can stand, the motion for judgment notwithstanding the verdict was rightfully granted, and the judgment is affirmed.

MOUNT, CHADWICK, PARKER, and HOLCOMB, JJ., concur.

[No. 12529. Department One. August 16, 1915.]

JOHN T. MATSON, *Respondent*, v. ROY D. FRANK, *Appellant*.¹

MORTGAGES — FORECLOSURE — ATTORNEY'S FEES—STATUTES. Upon the foreclosure of a mortgage securing the payment of a principal sum and interest according to the terms and conditions of two certain promissory notes, which notes provided for a reasonable attorney's fee, the superior court is authorized to fix a reasonable sum for attorney's fees to be included in the judgment and made a lien upon the mortgaged property; in view of Rem. & Bal. Code, § 474, which provides that the compensation of attorneys shall be left to the agreement of the parties, with allowances to the prevailing party of certain sums for expenses as costs, and § 475, providing that, in all cases of foreclosure of mortgages, the amount thereof shall be fixed by the court at such sum as the court deems reasonable, any stipulation in the note or mortgage to the contrary notwithstanding, but the fee in no case to be fixed above the contract price stated in the note and mortgage.

Appeal from a judgment of the superior court for King county, Frater, J., entered October 7, 1914, in favor of the plaintiff, allowing counsel fees upon the foreclosure of a mortgage. Affirmed.

Myers & Johnstone, for appellant.

John P. Hartman and *Arthur E. Nafe*, for respondent.

MOUNT, J.—This action was brought to foreclose a mortgage upon real estate. The defendants admit the allegations of the complaint except as to the attorney's fees. They alleged that the mortgage provided for no such fees. The only issue at the trial was whether a reasonable fee should be al-

¹Reported in 151 Pac. 89.

lowed. The trial court allowed an attorney's fee of \$100, which was made a lien upon the mortgaged property. This appeal is prosecuted from that part of the judgment.

The note provides:

"In case suit or action is instituted to collect this note, or any portion thereof, I promise and agree to pay in addition to the costs and disbursements provided by statute, reasonable sum of dollars in like gold coin for the attorney's fees in said suit or action."

The mortgage recites that it is

"To secure the payment of eleven thousand dollars, lawful money of the United States, together with interest thereon at the rate of six per cent per annum until paid, according to the terms and conditions of two certain promissory notes bearing even date herewith, . . ."

It is argued by the appellant that, because the mortgage did not in terms provide for the payment of attorney's fees, the court erred in including attorney's fees in the judgment and in making it a lien upon the real estate described in the mortgage. Our statute at § 474, Rem. & Bal. Code, provides:

"The measure and mode of compensation of attorneys and counselors shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed to the prevailing party upon the judgment certain sums by way of indemnity for his expenses in the action, which allowances are termed costs."

Section 475 provides:

"In all cases of foreclosure of mortgages and in all other cases in which attorney's fees are allowed, the amount thereof shall be fixed by the court at such sum as the court shall deem reasonable, any stipulation in the note, mortgage or other instrument to the contrary notwithstanding; but in no case shall said fee be fixed above contract price stated in said note or contract."

It seems plain from these sections that the court is authorized to allow a reasonable sum for counsel fees upon the

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judgment in mortgage foreclosures. In *Exchange National Bank of Spokane v. Wolverton*, 11 Wash. 108, 39 Pac. 248, in a foreclosure action where the mortgage was substantially the same as it is in this case, and in referring to the same statutes, it was held that an attorney's fee was proper to be allowed upon the judgment. In *Potvin v. Blasher*, 9 Wash. 460, 37 Pac. 710, we held that the notes and mortgage were to be construed as one transaction.

The appellant cites and relies upon *Clemens v. Luce*, 101 Cal. 432, 35 Pac. 1032, where it was held that, where a mortgage was given to secure a note according to the terms thereof, the mortgage did not secure an attorney's fee. The provisions of the California statute are not called to our attention. We are satisfied that, under our statute, it is the duty of the court, where an attorney's fee is provided for in either the note or the mortgage, to allow a reasonable attorney's fee to be taxed as costs upon the judgment. This seems to be the clear meaning of our statute. It might as well be argued that other costs are not a lien upon the property as to argue that attorney's fees cannot be a lien upon the property securing the note, because the attorney's fees under the statute are taxed as a part of the costs in the case. We are satisfied that, under our statute, the court properly found a reasonable attorney's fee in this case, and made the same a lien upon the mortgaged property.

The judgment is therefore affirmed.

MORRIS, C. J., MAIN, HOLCOMB, and CROW, JJ., concur.

[No. 12539. Department One. August 16, 1915.]

OMAR J. HUMPHREY, *Appellant*, v. MUTUAL LIFE INSURANCE
COMPANY, OF NEW YORK, *et al.*, *Respondents*.¹

APPEAL—REVIEW—DISCRETION. The refusal of a continuance on the ground of the absence of the plaintiff will not be disturbed except for abuse of discretion.

CONTINUANCE—ABSENCE OF PARTY—GROUNDS—SUFFICIENCY. A continuance on account of the absence of the plaintiff is properly denied where the plaintiff knew the date when the case was set for trial, and went to Alaska without notifying his counsel, and there was no showing of the necessity of his going or when he would return.

INSURANCE—ASSIGNMENT OF POLICY—DELIVERY. There is a valid and complete assignment and delivery of a life insurance policy by a husband to his wife, where the assignment was executed in duplicate and one copy attached to the policy and placed in safety deposit boxes to which the wife had access and the other copy sent to the insurance company, where it was received and filed.

INSURANCE—INSURABLE INTEREST OF WIFE—DIVORCE. Where a wife had an insurable interest at the time her husband assigned to her a policy of insurance upon his life, the existence of an insurable interest at the maturity of the policy is unnecessary, and her interest in the policy does not expire upon the procurement of a divorce.

INSURANCE—ASSIGNMENT OF POLICY—CONSTRUCTION. Upon an assignment of his life insurance policy by a husband "to his wife, if living, and if not to my estate," the wife cannot, without the husband's consent, surrender the policy and receive the cash surrender value.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 9, 1914, upon findings in favor of the defendants, in an action upon an insurance policy, tried to the court. Modified.

J. L. Finch and Brightman, Halverstadt, Tennant & Clarke, for appellant.

Marion A. Butler (George S. Cole, of counsel), for respondents.

¹Reported in 151 Pac. 100.

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MOUNT, J.—This action was brought to secure a decree adjudging that the defendant Ida May Zeile had no right to, or interest in, a policy of insurance issued by the Mutual Life Insurance Company of New York upon the life of the plaintiff. Upon a trial of the case, the court made findings of fact and entered a judgment to the effect that the defendant Ida May Zeile was entitled to the policy, and to the cash surrender value thereof. The plaintiff has appealed from that decree.

The facts are as follows: In December, 1897, the defendant insurance company issued its policy of insurance on the life of the appellant for the sum of \$10,000, being policy No. 873,279. This policy was payable to the executors, administrators, or assigns of the appellant. In November, 1901, the appellant and Ida May Zeile were married. On November 20, 1902, the appellant executed a written assignment of the policy to his wife, as follows:

"For one dollar to me in hand paid, and for other valuable considerations (the receipt of which is hereby acknowledged), I hereby assign, transfer and set over to Ida May Humphrey (my wife), if living, and if not to my estate, whose P. O. Address is San Francisco, Cal., all my right, title and interest in this policy, No. 873,279, issued by The Mutual Life Insurance Company of New York, and for the consideration above expressed, I do also for myself, my executors and administrators, guarantee the validity and sufficiency of the foregoing assignment to the above named assignee, her executors, administrators and assigns, and their title to the said policy will forever warrant and defend.

"Dated at San Francisco, this 20th day of Nov., 1902.

"In the presence of

Omar J. Humphrey.

"H. K. H. Mitchell."

This assignment was made in duplicate. One copy was attached to the policy, and the other copy was forwarded to the insurance company, and was received and filed by that company as a transfer of the insurance. The appellant informed his wife of this assignment. The policy, together

with the assignment, was placed in a safety deposit vault box of the California Title & Trust Company, in the city of San Francisco. The appellant directed the title and trust company to allow his wife to enter the safety deposit vault box whenever she might desire. Afterwards the appellant and the respondent, being then husband and wife, rented a safety deposit vault box in the Mercantile Trust Company, to which box they each had a key and free access thereto. The policy of insurance was placed in this box. Thereafter the appellant and the respondent lived together as husband and wife until about February, 1905. Some time prior to this date, the appellant had come to Seattle, Washington. His wife remained in San Francisco. Thereafter the appellant's wife brought an action for a divorce in the superior court for King county. While the divorce case was pending, the appellant went to San Francisco and took the insurance policy from the safety deposit box, and has retained possession thereof ever since. In November, 1905, the respondent was granted a divorce from the appellant. It appears that their property affairs had been settled prior to the entry of the decree, and the appellant had paid to his wife \$5,000 in money. At the time of the settlement, no mention was made of the insurance policy. In the decree of divorce, no mention was made of the insurance policy. About a year later, requests were made by the appellant to his wife to reassign the policy of insurance to him. This she refused to do. Whereupon the appellant defaulted in his premiums, and the policy, according to its terms, was by the company converted into a paid up policy for the sum of \$4,500, with a cash surrender value, on the 18th day of November, 1913, of \$1,977. Afterwards this action was brought. The insurance company appeared in the action and entered into a stipulation with the parties to the effect that it would abide by the decree of the court and recognize the contract in favor of the party adjudged entitled thereto. After the cause was at issue, it was regularly set down for trial, but the record does not show at whose in-

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stance. The date of the trial was fixed for the 29th day of May, 1914.

The appellant and his counsel knew the date fixed for the trial. Afterwards the appellant went to Alaska without informing his counsel that he was going away. A few days prior to the date fixed for the trial, his counsel moved the court for a continuance until the 3d day of June, upon the ground that the appellant had gone to Alaska and would not return before that date. It appears from the statement of counsel that the respondent had come from San Francisco, California, to attend the trial, and was in Seattle for that purpose. The trial court denied the motion for a continuance. The case proceeded to trial without the presence of the appellant.

The appellant makes two contentions upon this appeal: First, that the court erred in not granting a continuance, and second, in finding that the respondent was the owner of the insurance policy in question.

It is argued upon the first contention that the court abused its discretion in not granting the continuance. This court has uniformly held that the granting of a continuance is a matter resting within the sound discretion of the trial court, and the refusal to grant a continuance will not be reviewed except for an abuse of that discretion. *Nye v. Manley*, 69 Wash. 631, 125 Pac. 1009. As we have seen above, the action was begun by the appellant. He knew the date when the case was to be tried. With knowledge of this fact, he absented himself from this state and went to Alaska. Upon the showing made for a continuance, there is nothing to indicate the necessity for his going to Alaska, or when he would return, or that he was not negligent in being away at the time the case was to be tried. The respondent had come from San Francisco to Seattle to be present at the trial. Under these circumstances, we think it was not an abuse of discretion for the trial court to refuse the continuance.

The appellant argues upon the second question that the court erred in holding that the assigned policy was delivered to the respondent. *Weaver v. Weaver*, 182 Ill. 287, 55 N. E. 338, 74 Am. St. 173, is cited to support the position that there was no delivery of the assignment. The appellant, after executing a formal assignment to his wife for the express consideration of \$1, and other considerations, sent one copy of the assignment to the insurance company, where it was received and filed. He also placed the insurance policy, with the assignment thereof, in the safety deposit vault box to which his wife had access. Afterwards the policy was placed in another box, to which the appellant and his wife both had keys, and both had access. We think this was as much of a delivery as though the appellant had placed the policy in her hands. It was under her control, and in fact in her possession. It was, we think, a valid and complete assignment and delivery of the policy of insurance. In the case of *Weaver v. Weaver*, there had been an assignment of the policy, but the assignor had kept the policy in his own possession. There had been no delivery, except a statement to the effect that the assignment would be delivered, or would be held by the assignor for delivery. This case is further distinguishable from the *Weaver* case by the fact that the assignment here was for an express consideration of one dollar, and other valuable considerations, while in the *Weaver* case the policy was assigned apparently without consideration; at any rate without the assignment acknowledging such consideration. Upon both these grounds, we think this case is distinguishable from the *Weaver* case.

The appellant further argues that the insurable interest of the respondent, if she had such an interest, expired upon the date of the decree of divorce. Mr. Cooley in his briefs on the law of insurance, vol. 1, p. 311, says:

“The rule, stated in general terms, may then be said to be that if the policy is valid at its inception, because based on an adequate insurable interest, the existence of such an in-

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terest at the maturity of the policy is unnecessary. While it has not been approved by all American courts, it has been indorsed by a large majority of them."

And in the same volume, at page 312, he says:

"The leading case, however, is *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251, where the policy was issued on the joint lives of husband and wife, payable to the survivor on the death of either. It was contended that there had been an entire termination of the insurable interest of the wife by reason of a divorce, and that she could not recover on the death of the husband. The court, however, while admitting that if, at the inception of the policy, there had been a mere colorable or temporary interest, the termination of such an interest would bar a recovery, applies the general rule that a policy valid at its inception is not terminated by a cessation of interest, in the absence of a provision to that effect in the policy itself, and held that the right of the wife was not terminated by the divorce."

And in vol. 4, at page 3736:

"A married woman named as beneficiary in an ordinary life insurance policy on the life of her husband is entitled to the proceeds, notwithstanding that she has obtained a divorce before insured's death."

We are satisfied that this is the correct rule, and that the respondent, at the time the policy was assigned to her, had an insurable interest, and that such insurable interest continues.

The appellant also argues that, by the terms of the assignment, the respondent is not entitled to surrender the policy and receive the cash surrender value. It was conceded by counsel at the argument in this court that this position is correct under the wording of the assignment, and that the decree may be modified to that extent.

For the reasons stated, the judgment decreeing the respondent to be the beneficiary according to the assignment, is affirmed; but the decree of the lower court is modified so that the respondent shall not, without the appellant's consent,

surrender the policy to the insurance company at its cash surrender value. Costs are awarded in favor of the respondents.

MORRIS, C. J., MAIN, HOLCOMB, and FULLERTON, JJ.,
concur.

[No. 12661. Department One. August 16, 1915.]

JOHN NEWSOME, *as Administrator etc.*, Appellant, v.
KATE ALLEN *et al.*, Respondents.¹

APPEAL—REVIEW—PARTIES ENTITLED TO ALLEGE ERROR—WAIVER. Where, in a law action, appellants demanded consideration of the case as one of equitable cognizance, which was granted and acquiesced in by respondent, error cannot be predicated on such action by the court.

GIFTS—CAUSA MORTIS—DELIVERY—SUFFICIENCY. There was no sufficient delivery of checks, drafts, notes and certificates of deposit, contained in a safety deposit box, to constitute a valid gift *causa mortis*, where the donor and her sister, the donee, visited the vault and took the box and contents into a booth, and replaced the papers, which were not so bulky that they could not have passed from hand to hand, and the donor then informed the manager that she was going to a hospital for an operation, and in case she did not come back, the contents "are to be delivered" to the donee, stating to her "here are the keys; in case I do not come back, you know what to do;" and informing the manager that she made the donee "a partner in the box"; since the delivery was not as perfect and complete as the nature and circumstances of the property permitted.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered October 22, 1914, upon findings in favor of the defendants, in an action by an administrator to recover personal property as assets of an estate, tried to the court and a jury. Reversed.

Raymond J. McMillan and E. K. Murray, for appellant.
W. C. Elliott and Jay E. Taylor, for respondent.

HOLCOMB, J.—Appellant is the widower of Anna J. Newsome, who died at Tacoma, Washington, July 14, 1913, and

¹Reported in 151 Pac. 111.

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is the administrator of her estate, and commenced this action as such to recover from respondents specific personal property as follows, to wit:

(a) Manager's check No. 8297, The Bank of California, N. A., Tacoma, payable to order of Anna J. Newsome, for \$60, dated Tacoma, Wash., February 6th, 1913;

(b) Real estate coupon mortgage note, J. W. Clark and wife, Jenette Clark, to Anna J. Newsome, dated Tacoma, Wash., February 2d, 1911, due February 2d, 1914, for \$1,500, payable to the Bank of California, N. A., Tacoma, with interest at eight per cent, payable semi-annually, with coupons due August 2d, 1913, February 2d, 1914, attached;

(c) Certificate of deposit, No. 51879, The Bank of California, N. A., Tacoma, dated Tacoma, Wash., September 8th, 1910, for \$4,140, payable to Mrs. A. J. Weber, or order;

(d) Certificate of deposit, No. 54425, The Bank of California, N. A., Tacoma, dated Tacoma, Washington, June 4th, 1912, for \$690, payable to Mrs. A. J. Weber, or order;

(e) Check of city of Tacoma, Treasurer's office, No. 3827, dated Tacoma, Washington, November 21st, 1911, for \$1,000, payable to order of A. J. Newsome, and drawn on Fidelity Trust Company, Tacoma;

which property he alleges was the community property of himself and decedent, and was wrongfully taken from the estate by respondent, Kate Allen, who claimed to act in behalf of herself and sisters.

Respondents admit that they took the described property, but assert that it was the separate property of decedent, who was their sister, and that she gave the same to them in apprehension of death and during her last illness, and that they hold title thereto under a valid gift *causa mortis*.

The two questions of fact under the pleadings, and which were submitted to the jury, were: (1) The separate or community character of the property; and (2) whether or not a valid gift thereof had been made by the decedent to respondents.

The jury found: (1) That the checks for \$60 and \$1,000 and the note for \$1,500 were the community property of appellant and decedent, and the certificates for \$4,140 and \$690 the separate property of decedent; and (2) that neither the property so found to be separate nor the property found by them to be community was given to the respondents. The court, proceeding upon the theory that the case was one in equity and the verdicts of the jury merely advisory, disregarded such verdicts and made its findings of fact, wherein it adopted the verdict of the jury as to the separate and community character of the property, but set aside the verdict of the jury that neither the securities found to be community property nor the securities found to be separate property were given to the respondents. The appellant moved that the court set aside that portion of the verdict finding the certificates of deposit for \$4,140 and \$690 were the separate property of the decedent, which motion was denied. It then entered its final judgment, adjudging respondents to be the sole owners of a one-half interest in the checks for \$60 and \$1,000, and the note for \$1,500, and all the certificates of \$4,140 and \$690. It is from this portion of the final judgment that this appeal is taken.

Appellant and decedent were married September 22, 1902. Prior thereto, decedent was the widow of John Weber, who died in December, 1892, leaving her his estate, together with \$2,000 life insurance. The decree of distribution, of which decedent was executrix, orders the distribution to her of \$5,265. It does not appear whether or not the \$2,000 insurance money was included in this sum. At the time of his death, Weber owned the furniture in, and conducted, the Lafayette Hotel at Tacoma, Washington, which decedent continued to conduct for eleven months after his death and then sold for \$800.

There is some contention by appellant that the action is a law action, and that the findings of the jury are conclusive as to all proper issues of fact, even though special in form.

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The parties have reversed their positions. Appellant objected to a jury below because the case was of equitable nature, while the respondents insisted upon a jury and declared it to be a law action. In its origin and nature, it was essentially a law action to recover specific personal property. Rem. & Bal. Code, § 314 (P. C. 81 § 205). The answers did not set up any equitable defenses or change the character of the case. But the appellant demanded the consideration of the issues as of equitable cognizance, which was granted by the trial court and acquiesced in by the respondents. The parties cannot now, therefore, be heard to the contrary, whereby either might derive an advantage over the other. So far as the parties are concerned, the case stands as one of equitable jurisdiction.

The probable origin of the property, the course of dealing therewith by both appellant and decedent, and the declarations concerning the same by, and estoppels of record against, appellant undoubtedly justify the finding of the jury that the certificates for \$4,140 and \$690 were the separate property of decedent, who would therefore have the sole right of disposition thereof by gift or bequest. As to her right to dispose of her interest in the community personality in controversy by gift, we express no opinion.

Having the legal right and power of disposition of the certificates for \$4,140 and \$690, did the decedent make a valid gift *causa mortis*? The question is determined by the intention and the character of the tradition or delivery of the property. The circumstance of possession by the donee is not sufficient to establish either delivery or intention to give.

In *Jackson v. Lamar*, 67 Wash. 385, 121 Pac. 857, these observations were made:

"What constitutes a gift . . . within the legal definition . . . is essentially a matter of evidence and not of law; and each particular case must depend upon its own circumstances, and must be such as to authorize the belief that a gift was intended. Thornton, Gifts, § 217.

"Anciently, gifts were viewed with suspicion by the courts, as being fruitful sources of fraud, perjury, and litigation. They were disfavored by the law, and almost conclusive evidence was required to sustain them. Such strictness does not now obtain. The law favors every man's right to dispose of his property as and when he will, and when the intent and the act are clearly established by competent evidence, favors the disposition by gift as well as though he had undertaken to dispose of his belongings by the stricter formality of a written disposition.

"But the courts have never departed from their vigilance in holding that something more is required to constitute a gift, either *inter vivos*, or *causa mortis*, than the expression of an intent or purpose to give. Evidence of such intent is admissible to prove the act, but it does not constitute the act, and delivery either actual or constructive, is as essential today as it ever was. The donor must not only signify his purpose to give, but he must deliver, and as the law does not presume that an owner has voluntarily parted with his property, he who asserts title by gift must prove it by evidence that is clear and convincing, strong and satisfactory. The modern rule that the intention of the donor having been ascertained, great latitude should be given in carrying out that intention, still demands a delivery as perfect and complete as the nature of the property and the attendant circumstances and conditions will permit. *Blake v. Jones*, 1 Bailey's Eq. (S. C.) 141, 21 Am. Dec. 530; *Phinney v. State ex rel. Stratton*, 36 Wash. 236, 78 Pac. 927, 68 L. R. A. 119."

On this footing it has been adjudged in some instances that delivery of the key was sufficient delivery for a valid *donatio mortis causa* of money or documents locked in a trunk or other receptacle, not within the presence or immediate control of the donor. *Cooper v. Burr*, 45 Barb. (N. Y.) 9; *Marsh v. Fuller*, 18 N. H. 360; *Jones v. Brown*, 34 N. H. 439; *Thomas v. Lewis*, 89 Va. 1, 15 S. E. 389, 37 Am. St. 848, 18 L. R. A. 170; *Phipard v. Phipard*, 55 Hun 433, 8 N. Y. Supp. 728; *Pink v. Church*, 60 Hun 580, 14 N. Y. Supp. 337.

In *Hatch v. Atkinson*, 56 Me. 324, 96 Am. Dec. 464, it was said:

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"But it [the law] does require clear and unmistakable proof, not only of an intention to give, but of an actual gift, perfected by as complete a delivery as the nature of the property will admit of. It not only requires the delivery to be actual and complete, such as deprives the donor of all further control and dominion, but it requires the donee to take and retain possession till the donor's death. Although the delivery may have been at one time complete, yet this will not be sufficient, unless the possession be constantly maintained by the donee. If the donor again has possession, the gift becomes nugatory."

The above statement may be somewhat too strong as regards delivery and possession, for under the relaxed modern rule, delivery may be constructive, if as perfect and complete as the nature, condition and circumstances of the property will permit, and so, also, may possession by the donee be constructive, but must also be as perfect and complete as the nature, condition and circumstances of the property will permit.

In the present case, on July 9, 1913, the donor and donee went into the vault wherein was the safe deposit box containing the certificates of deposit and securities in controversy; they took the box therefrom and took it into a booth; they were both in the immediate presence of the property, which was not so bulky and unwieldy that it could not have passed from hand to hand. They then replaced the contents in the box, replaced the box in the vault, went to the desk of Mr. Bonney, the manager, when the donor said that she was going to the hospital for an operation, and "In case I don't come back, the contents (of the box) *are to be delivered* (Italics ours) to Mrs. Allen and my sister." After this statement she turned and faced Mrs. Allen and laid the keys on the counter and said: "Kate, here are the keys; in case I don't come back you know what to do." Mr. Bonney also testified that when they entered the place, Mrs. Newsome introduced Mrs. Allen as her sister and made her "a partner in the box." Five days later Mrs. Newsome died in the hospital.

Although it may be justly inferred that Mrs. Newsome had good reasons to desire and intend to reward her sister for attentions and care during the ill health of Mrs. Newsome by giving to her personal property, and fully expressed such an intention, she did not, when *in periculo mortis*, deliver the property, either actually or constructively. At most she only partially delivered possession constructively. The property was deposited in a safety deposit box held in partnership by herself and her sisters. She instructed that, in case she did not come back, the contents of the box *were to be* delivered to her sisters. The contents were of such nature, and the conditions and circumstances were such, that they could have been then and there delivered into the actual possession of Mrs. Allen. They were not. In the contingency of Mrs. Newsome's death, of which she was then in peril, they "were to be delivered." This was not enough. There was no sufficient delivery to constitute a valid gift *causa mortis*. The jury correctly so found. Consequently the appellant is entitled to possession of all the personal property in controversy, to administer upon same and distribute according to law.

The judgment of the court is therefore reversed, with directions to grant judgment in favor of appellant with costs.

MORRIS, C. J., CHADWICK, PARKER, and MOUNT, JJ., concur.

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Syllabus.

[No. 12930. Department Two. August 16, 1915.]

THE STATE OF WASHINGTON, *on the Relation of Pierce County et al., Plaintiff*, v. THE SUPERIOR COURT
FOR THURSTON COUNTY, *Respondent*.¹

STATES—ACTIONS—LIABILITY TO BE SUED—"SUIT AGAINST STATE"—CONDITIONS—VENUE. An action brought against the state auditor and state highway commissioners to restrain these officers from certifying that certain sums are payable out of the state treasury and from drawing state warrants therefor, on the allegation that the contract under which state highway work is being done was void for fraud in its inception, is in effect an action against the state; and can be brought only by consent of and in the manner directed by the state; and under Rem. & Bal. Code, § 886, must be brought in Thurston county.

STATES—RIGHT OF ACTION—TAXPAYER'S SUIT. A taxpayer, suing as such, with no private interests involved, cannot maintain an action against the state to prevent the misappropriation of public moneys, since the power rests alone with the attorney general.

SAME—TAXPAYER'S SUIT—JURISDICTION—CAPACITY TO SUE—RIGHT TO OBJECT—WAIVER. The objection that a taxpayer, as such, cannot maintain an action against the state to prevent the misappropriation of public moneys, which can only be brought by the attorney general, raises more than the question of mere legal capacity to sue, but asserts want of power to maintain the action; and hence can be raised by any party to the action or by the court and is not waived by failure of the attorney general to object.

SAME—TAXPAYER'S SUIT—RIGHT TO SUE. The rule denying to taxpayers the power to sue state officers for the misappropriation of state funds is not affected by the fact that plaintiff has a right of action against other parties who are joined with the state, nor by the fact that a county has a greater interest in the fund than the state, as part of its appropriation of state funds to be used on roads in the county; nor by the fact that a taxpayer's action affords more prompt and efficient remedies.

PROHIBITION—TO COURTS—INADEQUACY OF REMEDY BY APPEAL. Prohibition lies to prevent further proceedings in an action, brought by a taxpayer, as such, to enjoin state officials from misappropriating state funds, in payment for state highway work, although an appeal lies from the final judgment entered, where, on account of special and peculiar circumstances, the remedy in the ordinary course of law is inadequate.

¹Reported in 151 Pac. 108.

Application filed in the supreme court July 14, 1915, for a writ of prohibition to the superior court for Thurston county, Mitchell, J., to prohibit further proceedings in a cause. Granted.

Fred G. Remann, Harry E. Phelps, and Hayden, Langhorne & Metzger (William H. Pratt, of counsel), for relators.

J. T. S. Lyle and John A. Shackelford, for respondent.

The Attorney General and Edward W. Allen, Assistant, amici curiae.

FULLERTON, J.—On March 26, 1915, pursuant to the statutes relating to the construction of permanent highways, the board of county commissioners of Pierce county passed a resolution for the improvement of a highway in that county to be thereafter known as "Permanent Highway No. 6 Pierce County." After certain preliminary proceedings, not necessary here to recite, the board issued a call for bids for the construction of the improvement; the work to consist of clearing, grubbing and grading the land along the route selected for the highway, and the laying thereon of some one of twelve different forms of pavement described in the call. Bids were received at the time appointed, and, after consideration, the board accepted as the lowest and best bid for the work the bid of the Washington Paving Company. Prior, however, to the actual letting of the contract, an action was begun by a taxpayer of Pierce county against the county, its commissioners, and the paving company, seeking to enjoin the letting of the contract. A temporary injunction was sought to restrain the parties from acting during the action, which the trial court refused to grant; the order of refusal being dated May 24, 1915. Immediately thereafter, the contract was entered into, and the work of construction begun. Later the action was dismissed without prejudice.

On June 19, 1915, one W. P. Reynolds, a resident and taxpayer of the county of Pierce, began an action in the superior

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court of Thurston county, making parties defendant thereto Pierce county, its commissioners, the Washington Paving Company, C. W. Clausen, as state auditor, and W. R. Roy, as state highway commissioner, praying that the contract entered into between the county and the paving company be adjudged null and void; that further work on the highway pursuant thereto be permanently enjoined; and that the county commissioners of Pierce county and the state highway commissioner be enjoined from certifying for payment to the state auditor any sum of money as earned under the contract, and that the state auditor be enjoined from issuing warrants on the state treasurer for the payment of any of such sums, if so certified for payment. The action was founded on the allegation that the contract between the board of county commissioners and the paving company was the result of fraud and collusion practiced by and between certain of the members of the board and the paving company, whereby other persons and firms desiring to bid on the work were denied the privilege of bidding on equal terms with the Washington Paving Company, thereby preventing competitive bidding for the work except in form only. On filing the complaint, a temporary injunction pending the final disposition of the action was applied for by the plaintiff, notice of which was given the defendants. Prior to the hearing on the application, the defendants, Pierce county, its county commissioners, and the Washington Paving Company appeared specially and moved for a dismissal of the action on the ground that the court was without jurisdiction either of the subject-matter of the action or the persons of the defendants. The motions were overruled, whereupon they demurred on the same ground, and upon the additional ground that the plaintiff was without power to maintain the action. The demurrer was likewise overruled, and thereafter a hearing was had on the application for a temporary injunction, which resulted in an order of the court granting the same.

This is an application for a writ of prohibition, brought on the relation of Pierce county, its board of county commissioners, and the Washington Paving Company, defendants in the action last mentioned, against the superior court of Thurston county, and John R. Mitchell, as judge thereof, seeking to prohibit the court and judge named from proceeding further in that action. The application is founded on the contention that the court is proceeding without and in excess of its jurisdiction, and is thus subject to restraint in this form of proceeding. The relators have suggested a number of reasons why the lower court was without jurisdiction to entertain the suit of the plaintiff below, but there is one preliminary to all the others that has seemed to us to be controlling, and this alone we shall notice.

It is well settled that an action cannot be maintained against the state without its consent, and that the state, when it does so consent, can fix the place in which it may be sued, limit the causes for which the suit may be brought, and define the class of persons by whom it can be maintained. In other words, the state being sovereign, its power to control and regulate the right of suit against it is plenary; it may grant the right or refuse it as it chooses, and when it grants it may annex such condition thereto as it deems wise, and no person has power to question or gainsay the conditions annexed. This state has, by its constitution (art. 2, § 26), empowered the legislature to direct by law in what manner and in what courts suits may be brought against it, and the legislature has provided that all such suits shall be brought in the superior court of Thurston county. Rem. & Bal. Code, § 886 (P. C. 453 § 9).

The suit in question, while in form a suit against certain of its executive officers in their representative capacities, is in essence and effect a suit against the state. The suit is instituted to restrain these officers, the one from certifying that certain sums payable out of the state treasury has

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been earned in the performance of a contract in which the state has an interest, and the other from drawing warrants on the state treasury for the payment of such certificates, if any are so presented to him. The funds involved are the funds of the state. The officers sought to be enjoined have no interest in the funds. They are merely the agents of the state by and through whom the state acts. They are not charged with acting in excess of the authority conferred upon them by law, nor is it charged that the law under which they are acting is for any reason void. The charge is, on the contrary, that a contract in which the state has an interest, and which, if valid, makes a charge upon the state's funds, is void because of fraud in its inception. Clearly we think such a suit, even though brought against its officer, must in effect be a suit against the state.

Again, it is a settled principle in this state that a taxpayer, as such, cannot maintain an action against the state or any of its officers to prevent the misappropriation of public moneys, but that this power rests alone with the *Attorney General*. This we first held in the early case of *Jones v. Reed*, 3 Wash. 57, 27 Pac. 1067, and have reaffirmed in the cases of *Birmingham v. Cheetham*, 19 Wash. 657, 54 Pac. 37; *Tacomoma v. Bridges*, 25 Wash. 221, 65 Pac. 186; and *Bilger v. State*, 63 Wash. 457, 116 Pac. 19. It is needless to state the arguments by which the principle is maintained. This is done fully in the case wherein the rule was first announced, where it is acknowledged also that the cases on the question are not uniform. The court was then called upon to choose between two opposing rules, and feeling itself "untrammelled by precedent or authority in laying down a policy for this state, deemed it safer to relegate the instituting of suits involving the disposition of the revenues of the state, where no private interests are involved, to the judgment and discretion of the attorney general." The rule we think ought not now to be departed from.

Seemingly, therefore, since the suit is against the state, and the plaintiff in the suit is suing as a taxpayer, with no private interests of his own involved, the trial court in entertaining the action is proceeding in excess of its jurisdiction. The appellants, however, suggest certain reasons why this principle is not available to the relators, the first of which is that the relators cannot of themselves raise the question, but that it must be raised by some representative of the state, and no such representative has as yet done so. The suggestion is founded on the principle of want of legal capacity in the plaintiff to sue, and it is argued that, since the plaintiff in the pending action has legal capacity as a taxpayer to sue the relators, it is not of concern to them that others whom he may not sue are joined in the action. But we think the question here is something more than mere want of legal capacity to sue, as that phrase is commonly understood. The provisions of the statutes relating to pleadings make want of legal capacity to sue a distinct ground of demurrer, and it is generally held that the objection is waived if not raised by the defendant to whom the objection is available. But legal capacity to sue, as thus used, has reference to personal disabilities, such as infancy, coverture, idiocy, and the like. It recognizes a right of action in the individual, but denies to him the right to maintain it in his own proper person. The objection here goes deeper than this. It asserts a want of power in the plaintiff to maintain the action; it asserts that in no event, and under no circumstances, and in no capacity, does the plaintiff represent the cause of action he seeks to invoke. His legal capacity to sue in the sense of personal disability is not questioned. It is contended that the wrong committed does not so far affect him personally that he may maintain an action to correct it. If the contention be sound, and we hold that it is, a judgment entered therein would be nugatory. Under such circumstances, we think any party to the action, or even the court itself, may make the objec-

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tion. And especially we think must this be the rule in a case like the present. Here the suit is against the sovereign state, which can only be sued in a particular place, in a particular manner, and (in cases such as the case in question) by a specially designated person. Clearly no officer of the state has power, by mere failure to object, to permit the state to be sued in any other or different manner, or by any other or different person than it has itself permitted. We think, therefore, that the court in which the action is pending not only has the power to call in question, but owes to itself and to the state the duty of calling in question, the right of the plaintiff to maintain the action.

Again, it is said (if we have correctly gathered the meaning of the respondents) that the appellant as a taxpayer has the right to maintain an action to inquire into the validity of the acts of the county authorities, and that this right carries with it the right to join the state and its officers therein, since they are necessary parties to a complete determination of the issues. But the state's immunity from suit, except in so far as it may have granted it away, exists at all times and under all circumstances. If it cannot be sued alone by a particular plaintiff, it cannot be sued by him by the mere process of joining other parties with it. To so hold would be to extend the privilege of suit beyond that to which the legislature, the paramount power, has extended it.

Arguing against the policy of the rule of the case of *Jones v. Reed*, the respondents call attention to that part of the statute creating the permanent road fund which requires the expenditure on the permanent highways in each county of a sum equal to the amount paid into the fund by that county, and contend therefrom that the county's interest in the fund is greater than it is in the more purely state funds in the state treasury, and for this reason ought to be subject to control at the suit of a taxpayer. But the rule is not directed against the purpose of the suit, but is directed against

the policy of permitting the state or its officers to be subjected to such suits. As was said in the case of *Jones v. Reed*:

"As the fallacy of a proposition can best be shown by distorting it, we may presume that if one of the departments of the state government can be suspended at the instance of a private citizen, who has nothing more than a community interest in a matter which concerns the general public, that every department of the state can be suspended at the same time, and the whole machinery of the government stopped, and the very existence of the state, so far as the exercise of its functions are concerned, destroyed. Surely such a theory of practice is not in harmony with the genius of our government, nor will authority sanction, or public policy permit, the adoption of a rule which will authorize any number of volunteers who may, rightfully or wrongfully, interpret the laws different from the interpretation put upon them by the officers of the state, to paralyze for a time every or any branch of the state government. It seems to us that there is a difference in principle, and there might be a very great difference in results; and probable results are what the policy of the law is based upon. To prevent just such results, and to protect the interests of the public, the statute has provided for the election by the taxpayers of an officer—the attorney general—who is especially clothed with authority to institute proceedings of this kind."

Nor can it be said that the rule will not afford as prompt or efficient remedies against misappropriation of state funds as will the rule permitting a taxpayer to sue. It is not to be supposed that the attorney general will neglect or refuse to perform his duties, and a taxpayer, having knowledge of such misappropriation, has but to submit the matter with his proofs to that officer to obtain an investigation, and action thereon if the facts warrant such a course.

Finally, it is said that the remedy of the relators for the relief they seek is not by the writ of prohibition, but by an appeal from the final judgment of the trial court, if adverse to them. Doubtless an appeal would lie from such a judgment, and that ordinarily such would be the only relief af-

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forded. But this case presents special and peculiar circumstances, rendering the remedy in the ordinary course of law inadequate.

Our conclusion is that the alternative writ heretofore issued should be made peremptory. It is so ordered.

MORRIS, C. J., CROW, ELLIS, and MAIN, JJ., concur.

[No. 12705. Department One. June 15, 1915.]

LUCINDA ADAMS, *Respondent*, v. ADELINE HAZELRIGG, *Appellant*.¹

Appeal from a judgment of the superior court for King county, Humphries, J., entered November 27, 1914, upon findings in favor of the plaintiff, in an action in tort, tried to the court. Affirmed.

Longfellow & Fitzpatrick, for appellant.

Frank S. Griffith, for respondent.

PER CURIAM.—This is an action for damages alleged to have been received by the respondent in an assault and battery made upon her by the appellant.

The principal question upon this appeal is which was the aggressor in the affray. There is hopeless conflict in the evidence upon this question. The trial court found that the defendant was the aggressor. We have read the entire record with care, and are not convinced that the trial court was wrong in this conclusion.

The judgment is therefore affirmed.

[No. 11600. *En Banc*. August 4, 1915.]

HERRING-HALL-MARVIN SAFE COMPANY, *Respondent*, v. PURCELL SAFE COMPANY, *Appellant*.²

Appeal from a judgment of the superior court for King county, Dykeman, J., entered May 17, 1913, upon findings in favor of the plaintiff, in consolidated actions of replevin and on an account stated, tried to the court. Reversed.

Gay & Kellerman and Hughes, McMicken, Dovell & Ramsey, for appellant.

Charles P. Spooner and George R. Biddle, for respondent.

ON REHEARING.

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court adhere to the opinion heretofore filed herein as reported in 81 Wash. 592, 142 Pac. 1153.

For the reasons there stated, the judgment is reversed, and the cause remanded with instructions to dismiss the action.

¹Reported in 149 Pac. 324.

²Reported in 150 Pac. 1162.

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Opinion Per Curiam.

[No. 12571. Department One. August 4, 1915.]

RUFFE-KIRKPATRICK COMPANY, *Respondent*, v. WEST COAST PACKING COMPANY, *Appellant*, J. A. LARGAUD, *Respondent*.¹

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered May 16, 1914, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Newman & Kindall, for appellant.

Brown, Peringer & Thomas, for respondent.

PER CURIAM.—This is an action to recover money. No question of law is involved. After a full hearing, judgment went for the plaintiff and against the defendant West Coast Packing Company.

We have read the entire record. The testimony is in sharp conflict. We believe with the trial judge that the plaintiff has sustained his case by a preponderance of the evidence.

Affirmed.

[No. 12646. Department Two. August 4, 1915.]

ABERDEEN LUMBER & SHINGLE COMPANY, *Appellant*, v. CHEHALIS COUNTY *et al.*, *Respondents*.²

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered February 4, 1915, upon findings in favor of the defendants, dismissing an action to secure the reduction of a tax, tried to the court. Affirmed.

Hogan & Graham and Bridges & Bruener, for appellant.

J. E. Stewart, Wm. E. Campbell, A. Emerson Cross, and O. M. Nelson, for respondents.

PER CURIAM.—This case is controlled by the decision in the case of *National Lumber & Mfg. Co. v. Chehalis County*, ante p. 483, 150 Pac. 1164, and upon the authority of that case, the judgment is affirmed.

¹Reported in 150 Pac. 1172.

²Reported in 150 Pac. 1167.

[No. 12647. Department Two. August 4, 1915.]

SLADE LUMBER COMPANY, *Appellant*, v. CHEHALIS COUNTY *et al.*,
Respondents.¹

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered February 4, 1915, upon findings in favor of the defendants, dismissing an action to secure the reduction of a tax, tried to the court. **Affirmed.**

Hogan & Graham and *Bridges & Bruener*, for appellant.

J. E. Stewart, *Wm. E. Campbell*, *A. Emerson Cross*, and *O. M. Nelson*, for respondents.

PER CURIAM.—This case is controlled by the decision in the case of *National Lumber & Mfg. Co. v. Chehalis County*, ante p. 483, 150 Pac. 1164, and upon the authority of that case, the judgment is affirmed.

[No. 12648. Department Two. August 4, 1915.]

GRAYS HARBOR COMMERCIAL COMPANY, *Appellant*, v. CHEHALIS
COUNTY *et al.*, *Respondents*.¹

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered February 4, 1915, upon findings in favor of the defendants, dismissing an action to secure the reduction of a tax, tried to the court. **Affirmed.**

Hogan & Graham and *Bridges & Bruener*, for appellant.

J. E. Stewart, *Wm. E. Campbell*, *A. Emerson Cross*, and *O. M. Nelson*, for respondents.

PER CURIAM.—This case is controlled by the decision in the case of *National Lumber & Mfg. Co. v. Chehalis County*, ante p. 483, 150 Pac. 1164, and upon the authority of that case, the judgment is affirmed.

¹Reported in 150 Pac. 1167.

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Opinion Per Curiam.

[No. 12649. Department Two. August 4, 1915.]

WESTERN LUMBER COMPANY, *Appellant*, v. CHEHALIS COUNTY *et al.*,
Respondents.¹

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered February 4, 1915, upon findings in favor of the defendants, dismissing an action to secure the reduction of a tax, tried to the court. Affirmed.

Hogan & Graham and *Bridges & Bruener*, for appellant.

J. E. Stewart, *Wm. E. Campbell*, *A. Emerson Cross*, and *O. M. Nelson*, for respondents.

PER CURIAM.—This case is controlled by the decision in the case of *National Lumber & Mfg. Co. v. Chehalis County*, ante p. 483, 150 Pac. 1164, and upon the authority of that case, the judgment is affirmed.

[No. 12650. Department Two. August 4, 1915.]

DONOVAN LUMBER COMPANY, *Appellant*, v. CHEHALIS COUNTY *et al.*,
Respondents.¹

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered February 4, 1915, upon findings in favor of the defendants, dismissing an action to secure the reduction of a tax, tried to the court. Affirmed.

Hogan & Graham and *Bridges & Bruener*, for appellant.

J. E. Stewart, *Wm. E. Campbell*, *A. Emerson Cross*, and *O. M. Nelson*, for respondents.

PER CURIAM.—This case is controlled by the decision in the case of *National Lumber & Mfg. Co. v. Chehalis County*, ante p. 483, 150 Pac. 1164, and upon the authority of that case, the judgment is affirmed.

¹Reported in 150 Pac. 1167.

[No. 12651. Department Two. August 4, 1915.]

ANDERSON & MIDDLETON LUMBER COMPANY, *Appellant*, v. CHEHALIS COUNTY *et al.*, *Respondents*.¹

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered February 4, 1915, upon findings in favor of the defendants, dismissing an action to secure the reduction of a tax, tried to the court. *Affirmed*.

Hogan & Graham and *Bridges & Bruener*, for appellant.

J. E. Stewart, *Wm. E. Campbell*, *A. Emerson Cross*, and *O. M. Nelson*, for respondents.

PER CURIAM.—This case is controlled by the decision in the case of *National Lumber & Mfg. Co. v. Chehalis County*, ante p. 483, 150 Pac. 1164, and upon the authority of that case, the judgment is affirmed.

[No. 12652. Department Two. August 4, 1915.]

BAY CITY LUMBER COMPANY, *Appellant*, v. CHEHALIS COUNTY *et al.*, *Respondents*.¹

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered February 4, 1915, upon findings in favor of the defendants, dismissing an action to secure the reduction of a tax, tried to the court. *Affirmed*.

Hogan & Graham and *Bridges & Bruener*, for appellant.

J. E. Stewart, *Wm. E. Campbell*, *A. Emerson Cross*, and *O. M. Nelson*, for respondents.

PER CURIAM.—This case is controlled by the decision in the case of *National Lumber & Mfg. Co. v. Chehalis County*, ante p. 483, 150 Pac. 1164, and upon the authority of that case, the judgment is affirmed.

¹Reported in 150 Pac. 1167.

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Opinion Per Curiam.

[No. 12653. Department Two. August 4, 1915.]

FEDERAL MILL COMPANY, *Appellant*, v. CHEHALIS COUNTY *et al.*,
Respondents.¹

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered February 4, 1915, upon findings in favor of the defendants, dismissing an action to secure the reduction of a tax, tried to the court. Affirmed.

Hogan & Graham and *Bridges & Bruener*, for appellant.

J. E. Stewart, Wm. E. Campbell, A. Emerson Cross, and O. M. Nelson, for respondents.

PER CURIAM.—This case is controlled by the decision in the case of *National Lumber & Mfg. Co. v. Chehalis County*, ante p. 483, 150 Pac. 1164, and upon the authority of that case, the judgment is affirmed.

¹Reported in 150 Pac. 1168.

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Remedy by appeal as affecting right to prohibition, see PROHIBITION.

III. DECISIONS REVIEWABLE.

1. APPEAL—DECISIONS APPEALABLE—AMOUNT IN CONTROVERSY—FICTITIOUS COUNTERCLAIM. The supreme court has no jurisdiction of an appeal from a judgment on a demand for less than \$200, where the appellant's so-called counterclaim was purely fictitious so far as legal liability was concerned and no proof was offered in support of it. *Jaklewicz v. Lenhart*..... 138
2. APPEAL—DECISIONS APPEALABLE—AMOUNT IN CONTROVERSY. An appeal from a judgment dismissing an action for contumacy in failing to comply with an order to strike one item of the complaint, will not be dismissed as involving only costs and less than \$200, where there was real error, in that other parts of the complaint tendering an issue were improperly disposed of. *Williams v. Lindenderger Packing Co.*..... 292
3. APPEAL—DECISIONS APPEALABLE—FINAL ORDERS—MANDAMUS. An order in mandamus proceedings by a citizen and taxpayer compelling the prosecuting attorney to institute *quo warranto* proceedings against a corporation, is a final order in the proceeding against the prosecuting attorney, and hence is appealable by him under the express provisions of Rem. & Bal. Code, § 1033. *State ex rel. Prosecuting Attorney of Spokane County v. Union Savings Bank of Spokane* 48
4. APPEAL—ORDERS REVIEWABLE—DEMURRER—FINAL ORDERS. Where a motion to strike an amended complaint alleging three several items of damages from breach of contract was treated and argued as a demurrer to one of the items only, the supreme court will not review the judgment thereon, so long as any issue tendered has not been disposed of on the merits. *Williams v. Lindenderger Packing Co.* 292
5. APPEAL—DECISIONS REVIEWABLE—CESSATION OF CONTROVERSY—PAYMENT OF COSTS. Upon appeal by a nonresident plaintiff from a judgment of dismissal, with costs to defendant, the deposit in court of sufficient money to cover the costs, for the sole purpose of protecting the plaintiff's sureties upon a nonresident bond that he had been compelled to furnish, is not a voluntary payment working a

APPEAL AND ERROR—CONTINUED.

cessation or waiver of the appeal. *Ehrlich-Harrison Co. v. Cushman* 190

6. **APPEAL—DECISIONS REVIEWABLE—CESSATION OF CONTROVERSY—REPEAL OF ACT—MOOT QUESTION.** In an action to enjoin threatened action by the insurance commissioner, where the only question involved is the constitutionality of provisions of an act which was amended pending the appeal by eliminating the provisions in question, the appeal will be dismissed as involving only a moot question; as it will not be presumed that the commissioner will longer enforce the eliminated provisions. *Standard Fire Ins. Co. v. Fishback* 225
7. **APPEAL—DECISIONS REVIEWABLE—CESSATION OF CONTROVERSY.** An appeal from a judgment enjoining interference with a fishing license that expired prior to the hearing on appeal will be dismissed; since there is no longer any subject-matter involved upon which a judgment can operate, and the supreme court will not retain jurisdiction to determine the sole question of costs. *Harper v. Grasser*..... 475
8. **APPEAL—DECISIONS APPEALABLE—JUDGMENT—PREMATURE APPEAL.** An appeal will be dismissed as premature where it was taken by oral notice, immediately upon denying defendant's motion for judgment notwithstanding the verdict, before entry of judgment upon the verdict either by the clerk or judge, and before disposal of plaintiff's motion for a new trial. *Inman v. Seattle*..... 603

X. RECORD.

9. **APPEAL—RECORD—EVIDENCE—NECESSITY.** Error cannot be assigned in the granting of continuances and the refusal to dismiss for want of prosecution, where the record on appeal does not show the evidence on which the continuances were granted. *Cathoun, Denny & Ewing v. Quinlan*..... 547
10. **APPEAL—RECORD—EXHIBITS.** Exhibits can only be made part of the record on appeal by bill of exceptions or statement of facts. *Union Machinery & Supply Co. v. Stuchell*..... 249
11. **APPEAL—RECORD—STATEMENT OF FACTS—IMPROPER ARGUMENT.** Error cannot be predicated upon improper argument to the jury, not disclosed by the statement of facts and shown only by affidavits in support of a motion for a new trial. *Gardner v. Spalt*..... 146
12. **APPEAL—RECORD—BILL OF EXCEPTIONS.** Upon a trial *de novo* in an equitable case, in the absence of a bill of exceptions or statement of facts, the only question presented is whether the findings support the judgment. *Union Machinery & Supply Co. v. Stuchell*..... 249
13. **APPEAL—STATEMENT OF FACTS—SETTLEMENT—DISPUTES—ASSIGNMENT OF ERROR.** Irregularity in settling the statement of facts is not a ground upon which error can be assigned; the remedy for an

APPEAL AND ERROR—CONTINUED.

erroneous statement being by application for a commission to settle the truth of the matter in dispute. *Calhoun, Denny & Ewing v. Quinlan* 547

14. **APPEAL — STATEMENT OF FACTS — CERTIFICATE — SUPPLEMENTAL STATEMENT.** A mandate to the trial court to correct or supplement its statement of facts, being discretionary, will not be issued where there is no reasonable certainty that the appellant is being denied any rights; as when it appears that the trial judge refused a supplemental statement as to the taking of alleged exceptions, on the ground that he did not so remember the facts, and that there was no record from which the truth could be ascertained; especially where there was lack of diligence in seeking the mandate. *State v. Engstrom* 499

XVI. REVIEW.

15. **APPEAL—REVIEW—PARTIES ENTITLED.** Appellants can take no exception to an order to apply proceeds of a sale in reduction of their liability, as it is beneficial to them. *Continental Distributing Co. v. Hays* 300
16. **APPEAL—REVIEW—PARTIES ENTITLED TO ALLEGE ERROR—WAIVER.** Where, in a law action, appellants demanded consideration of the case as one of equitable cognizance, which was granted and acquiesced in by respondent, error cannot be predicated on such action by the court. *Newsome v. Allen* 678
17. **APPEAL—REVIEW—VERDICT.** Where there is conflict in the evidence, the facts are for the jury, and unless physically impossible or naturally improbable so that reasonable minds could not differ thereon, the supreme court accepts as conclusive the fact necessarily resolved by the jury in respondent's favor. *Tooker v. Perkins*.. 567
18. **APPEAL—REVIEW—FINDINGS.** Findings upon conflicting evidence will not be disturbed on appeal, unless it can be said that they were not sustained by the preponderance of the evidence. *Stewart v. Fitzsimmons* 55
19. **APPEAL—REVIEW—FINDINGS.** Findings upon conflicting evidence will not be disturbed on appeal, where on trial *de novo*, the supreme court is unable to say that the evidence does not preponderate against them. *Williams v. Williams*..... 113
20. **APPEAL—REVIEW—FINDINGS.** Findings of the trial court upon conflicting evidence will not be disturbed on appeal where the evidence does not preponderate against the findings. *Calhoun, Denny & Ewing v. Quinlan*..... 547
21. **APPEAL—REVIEW—FINDINGS.** In actions tried to the court without a jury, legal or equitable, there must be a trial *de novo* on the record, and the judgment will be affirmed only when the supreme

APPEAL AND ERROR—CONTINUED.

- court is satisfied that the evidence does not preponderate against the findings. *Cochran v. Remillard*..... 582
22. APPEAL—REVIEW—PRESUMPTIONS. Upon appeal, a judgment *non obstante veredicto* will be presumed to have been entered upon the grounds stated in the motion, in the absence of any indication to the contrary. *Wiser v. Northwestern Improvement Co.*..... 433
23. APPEAL—REVIEW—DISCRETION. The refusal of a continuance on the ground of the absence of the plaintiff will not be disturbed except for abuse of discretion. *Humphrey v. Mutual Life Insurance Co.* 672
24. APPEAL AND ERROR—REVIEW—DISCRETION—GRANT OF NEW TRIAL. Under Rem. & Bal. Code, §§ 398, 399, authorizing a new trial after a trial by a jury, court, or referees and the setting aside of the verdict or other decision, it is discretionary to grant a new trial in an action at law tried to the court, which discretion will be reviewed only for abuse, where questions of law only are not involved. *Clark v. Ellington* 110
25. APPEAL—REVIEW—DISCRETION—GRANTING NEW TRIAL. The granting of a new trial for insufficiency of the evidence is discretionary, and will not be reviewed on appeal except for abuse of discretion. *Wilk v. King*..... 171
26. APPEAL—REVIEW—DISCRETION—NEW TRIAL. The discretion of the trial court in refusing to grant a new trial will not be disturbed on appeal, where there was some evidence and inferences from evidence sufficient to warrant the verdict. *Caughren v. Kahan*..... 356
27. APPEAL—DECISION—LAW OF CASE—DICTA. Where two issues are presented, decided by the supreme court, the decision on one issue cannot be said to be *dictum* merely because the decision might have rested on the other. *Milwaukee Terminal R. Co. v. Seattle*..... 102
28. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. It is not necessarily prejudicial error to receive in evidence upon cross-examination a letter containing self-serving declarations that were immaterial, instead of permitting only the material part to be read to the jury, where, on request, the court instructed the jury to disregard the improper parts. *Gardner v. Spalt*..... 146
29. SAME—REVIEW—ERROR INVITED BY APPELLANT. Error cannot be predicated upon the admission of the entire record in a certain case, where the error was invited by appellant insisting that the whole record go in, upon the offer of only a part of it. *Gardner v. Spalt* 146
30. APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE. The admission of immaterial evidence, in a cause tried to the court without a jury, does not entitle appellant to a new trial or a reversal

APPEAL AND ERROR—CONTINUED.

- where there is a trial *de novo* on appeal. *Calhoun, Denny & Ewing v. Quinlan* 547
31. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. The rejection of claims for damages for the taking of property without compensation because not filed within thirty days after the injury, as required by statute and ordinance for claims sounding in tort, while error, was not prejudicial, where the testimony was incompetent upon the hearing on an assessment roll. *Spokane v. Onstine*..... 4
32. APPEAL—REVIEW—HARMLESS ERROR. On a trial *de novo*, the improper exclusion of a letter which is in the record, is harmless error. *Clough v. Monroe*..... 507
33. APPEAL—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE. The refusal of the court to allow affidavits to be read, after having looked into the same and hearing a statement of their contents, is not prejudicial error, where there is a trial *de novo* on appeal. *Calhoun, Denny & Ewing v. Quinlan*..... 547
34. SAME—REVIEW—HARMLESS ERROR—INSTRUCTIONS. It cannot be assigned that a general instruction upon the limitation of certain evidence is insufficient where no more specific instruction was requested. *Gardner v. Spalt*..... 146
35. APPEAL—REVIEW—HARMLESS ERROR. Error in giving or refusing instructions is harmless, where recovery cannot be had in any event. *Druse v. Pacific Power & Light Co.*..... 519

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

36. APPEAL—DECISION—REVERSAL AND REMAND—SCOPE OF DECISION. Upon an appeal in probate proceedings, where the sole question presented was whether the evidence was sufficient to establish a partnership as to the estate under administration, and the case was remanded with directions to enter a decree in favor of the appellant establishing her one-half interest in the estate, the trial court has no power to go further or to enter a judgment requiring a conveyance of one-half of the partnership property and a money judgment for the proceeds of other property; no accounting having been had or debts or claims against the estate established. *State ex rel. Nicholson v. Superior Court* 196
37. APPEAL—DECISION—REMAND. Where judgment notwithstanding the verdict was erroneously entered, and an accompanying motion for a new trial was overruled simply to clear the record without passing on its merits, on reversal, the cause will be remanded with directions to pass upon the motion for a new trial. *Patch v. Northern Pac. R. Co.*..... 379
38. APPEAL—DECISION—JUDGMENT AGAINST SURETIES — BOND — SUPERSEDEAS. Upon affirmance of a decree of divorce, with modifications

APPEAL AND ERROR—CONTINUED.

as to the division of the property of the parties, requiring a money judgment against the defendant for attorney's fees and in lieu of specific property, judgment on the remittitur should be entered against the appellant and his sureties on the appeal and supersedeas bond, where the bond was in the statutory form under Rem. & Bal. Code, § 1722, conditioned to satisfy and perform the judgment or decree appealed from in case it should be affirmed, or any judgment the supreme court may render or order; in view of Id., § 1739, requiring judgments against the sureties for the amount recoverable according to the condition of the bond. *Willson v. Willson*..... 50

39. **SAME—JUDGMENT—CORRECTION OF REMITTITUR.** Upon application and with due diligence (five days after filing the remittitur) the supreme court will recall the remittitur to correct an inadvertent omission in failing to direct entry of judgment against the sureties on an appeal and supersedeas bond, upon affirmance of the decree. *Willson v. Willson*..... 50

APPLIANCES:

Dangerous to children, see **NEGLIGENCE**, 1.

APPLICATION:

For correction of remittitur, see **APPEAL AND ERROR**, 39.

For writ of certiorari, time for, see **CERTIORARI**.

Of property to debts of estate, see **EXECUTORS AND ADMINISTRATORS**, 1.

APPOINTMENT:

Of receiver, see **RECEIVERS**, 1, 2, 4.

APPORTIONMENT:

Of assessments for public improvements, see **MUNICIPAL CORPORATIONS**, 6, 8.

ARGUMENT OF COUNSEL:

Review of errors as dependent on presentation of same by record, see **APPEAL AND ERROR**, 11.

In criminal prosecutions, see **CRIMINAL LAW**, 2.

ASSAULT:

Injury to partnership business through assault on members of firm, see **PARTNERSHIP**, 2, 3.

ASSESSMENT:

Of expenses of public improvements, see **MUNICIPAL CORPORATIONS**, 3-8.

Of tax, see **TAXATION**, 2, 3.

ASSIGNMENT OF ERRORS:

See **APPEAL AND ERROR**, 13.

ASSIGNMENTS:

Corporate shares, see CORPORATIONS, 2.

Fraud as to creditors, see FRAUDULENT CONVEYANCES.

Of insurance policy, see INSURANCE, 1-3.

Validity of conditions against transfer of franchise, see TELEGRAPHS AND TELEPHONES, 4, 5.

1. **ASSIGNMENTS—PROCEEDS OF CROP SALE—AGREEMENT—TRUST—EVIDENCE—SUFFICIENCY—CONSIDERATION.** Where a cropping tenant, indebted to his landlord on a promissory note, and to a warehouseman for sacks, stored the crop of wheat in the warehouse and deposited the warehouse receipts in a bank where the tenant's note was held as collateral, and these parties, together with others claiming the right to liens for harvesting the crop, got together and agreed that the wheat should be sold, which was done, and part payment made by check to the bank holding the wheat receipts, one-third of which was supposed to belong to the tenant, the fact that the memorandum of sale of the wheat was made by the tenant as his own wheat, instead of for his creditors, does not show that there was no assignment of the fund or trust for the labor claimants for harvesting, where it further appears that it was customary for the grower to make the sale of his own wheat, that the indorsed wheat receipts were delivered to the tenant for that purpose, that he was to bring the money to the bank for distribution, and in the settlement the labor claims for harvesting were spoken of as being the first to be paid; the relation of debtor and creditor being sufficient consideration for the understanding to pay such labor claims. *Puget Sound Warehouse Co. v. LaHue*..... 395

ATTACHMENT:

Prior attachment as abatement of action, see ABATEMENT AND REVIVAL.

Wrongful attachment, see INDEMNITY; SHERIFFS AND CONSTABLES, 3.

Liability of sheriff for sale under junior writ, see SHERIFFS AND CONSTABLES, 1, 2.

Filing of writ and notice of levy as constructive notice to subsequent purchasers, see VENDOR AND PURCHASER, 2.

ATTORNEY AND CLIENT:

Review of errors in argument to jury as dependent on presentation of same by record, see APPEAL AND ERROR, 11.

Argument and conduct of counsel at trial in criminal prosecutions, see CRIMINAL LAW, 2.

Protection of lien of attorney as garnishee defendant, see GARNISHMENT, 1.

Fees on foreclosure of mortgage, see MORTGAGES.

AUTHORITY:

- Of corporate officers or agents, see CORPORATIONS, 4.
- Of guardian of incompetent, see INSANE PERSONS, 3.
- Of visiting judges, see JUDGES.
- Of partner to make contract, see PARTNERSHIP, 1.
- Of agent, see PRINCIPAL AND AGENT.
- Of city to grant franchise to telephone company for use of streets, see TELEGRAPHS AND TELEPHONES, 1, 2.

AUTOMOBILES:

- Collision with in city street, see MUNICIPAL CORPORATIONS, 17-21.

BALLOTS:

- Marking of by voter, see ELECTIONS.

BANKS AND BANKING:

- Unlawful agreement by officers to give notes for overdue interest on note held by bank as affecting validity thereof, see BILLS AND NOTES, 2-4.

BAR:

- Of action by former adjudication, see JUDGMENT, 9-13.
- Of action by limitation, see LIMITATION OF ACTIONS, 1, 2.

BENEFITS:

- To property from improvement, see MUNICIPAL CORPORATIONS, 4-8.

BEQUESTS:

- See WILLS.

BILL OF EXCEPTIONS:

- As part of record on appeal, see APPEAL AND ERROR, 10, 12.

BILLS AND NOTES:

- Note of husband as community debt, see HUSBAND AND WIFE, 4, 5.
 - Conflict of laws as to usurious nature of contract, see USURY.
1. **BILLS AND NOTES—ORDERS ON FUND—QUALIFIED ACCEPTANCE—CONSTRUCTION—EVIDENCE—TO EXPLAIN WRITING—AMBIGUITY.** An order by loggers to pay the sum of \$1 per M. up to the amount and as the sum may become due them on logs as per contract with the defendant, which was accepted by the defendant "as the amount is due" to the loggers, is ambiguous as limited by the acceptance, and admits of parol evidence to the effect that all the parties knew that the loggers were without funds, that advances to them by the defendant had been and were necessary, that there was no profit in the logging operations, and that nothing became due to the loggers, although subsequent to the acceptance enough logs were put in at \$1 per M. to pay plaintiff's claim had no further advance been made; and there could be no liability on the acceptance, since it is clear

BILLS AND NOTES—CONTINUED.

that defendant did not intend to guarantee profits to the loggers, and the parties understood that the logging contract was to carry itself. *Taylor v. Parish*..... 141

2. **BILLS AND NOTES—ACCOMMODATION NOTES—CONSIDERATION.** Where the state bank examiner had required a bank to collect overdue interest on a note or charge the note off, and officers of the bank gave notes to take up the interest in order to satisfy the examiner, their notes must, in law, be considered as an accommodation for the makers of the note, and not for the accommodation of the bank; hence there was a sufficient lawful consideration therefor. *Skagit State Bank v. Moody*..... 286
3. **SAME.** The indorsement of the interest on the note by the bank was a waiver of a present right of action against the maker and a sufficient consideration for the officers' notes for the overdue interest. *Skagit State Bank v. Moody*..... 286
4. **BILLS AND NOTES—VALIDITY—ILLEGAL PURPOSE—OTHER CONSIDERATION.** An unlawful agreement that officers of a bank should give notes for the amount of overdue interest on a note held by the bank, in order to deceive the state bank examiner, without being liable to the bank, does not invalidate their notes, as between the parties, where there was a lawful consideration therefor, the sum being intended as payment of the overdue interest and indorsed on the note as such. *Skagit State Bank v. Moody*..... 286

BLACKLISTING:

Wrongful publication of reasons for discharge of employee, see **MASTER AND SERVANT**, 1-4.

BONA FIDE PURCHASER:

Of articles purchased with stolen money, see **REPLEVIN**, 4.
Of lands, see **VENDOR AND PURCHASER**, 2.

BONDS:

See **SHERIFFS AND CONSTABLES**, 3.
On appeal, judgment against sureties, see **APPEAL AND ERROR**, 38.
Condemnation proceedings, see **EMINENT DOMAIN**, 7.
Required of commission merchants, see **FACTORS**, 4.
Receiver's bond executed by husband as surety, as community debt, see **HUSBAND AND WIFE**, 7.
Indemnity bonds, see **INDEMNITY**.
Contractor's bonds, see **MUNICIPAL CORPORATIONS**, 1.
Receiver's bonds, see **RECEIVERS**, 3, 4.
Validity of, what law governs, see **USURY**.

1. **BONDS—INDEMNITY—ACTIONS—PARTIES ENTITLED TO SUE—CREDITORS—PRIVITY.** The creditors of a subcontractor on state work cannot maintain an action upon his bond, not required by any statute,

BONDS—CONTINUED.

but given to the principal contractor to secure performance of the subcontract, since there is no privity between the parties to the action; even though such bond was conditioned, in part, in the language of Rem. & Bal. Code, § 1159, following the language of the principal contractor's bond to the state given to secure persons furnishing supplies and performing labor on public work; especially in view of that part of § 1159 providing that the original contractor's bond shall protect persons furnishing labor or supplies to any subcontractor on the work. *Spokane Merchants' Association v. Pacific Surety Co.* 489

BOUNDARIES:

Of shore land grants, see **NAVIGABLE WATERS**, 1.

BREACH:

Of contract, see **CONTRACTS**, 2, 6-8.

Of contract, election of remedy, see **ELECTION OF REMEDIES**.

Of contract of sale, see **SALES**, 1-3.

Of conditions in telephone franchise as working forfeiture, see **TELEGRAPHS AND TELEPHONES**, 5-7.

BROKERS:

See **FACTORS**.

1. **BROKERS—ACTION FOR COMMISSIONS—PROCURING CAUSE OF SALE—EVIDENCE—SUFFICIENCY.** A broker, with whom property had been listed for sale, but not exclusively, is not the efficient procuring cause of the sale, and therefore not entitled to commissions from the owner, where it appears that, with the owner's consent, he sent the listing to brokers in Spokane in the hope of effecting a trade, in which, according to custom, such brokers might collect their commission from the other party, but without informing the owner of the manner in which the brokers would adjust their commissions, that one of the Spokane brokers in turn sent the listing to another broker, who produced a customer and closed a deal for the sale or exchange of the property, charging the owner a commission which the owner paid. *Hayden v. Ashley*..... 653

BULK STOCK LAWS:

Sale of stock in bulk, see **FRAUDULENT CONVEYANCES**, 8.

BURDEN OF PROOF:

Good faith of transaction between husband and wife, see **FRAUDULENT CONVEYANCES**, 3, 6.

CANCELLATION OF INSTRUMENTS:

Rescission of contract, see **CONTRACTS**, 6; **SALES**, 2, 3; **VENDOR AND PURCHASER**, 1.

CANCELLATION OF INSTRUMENTS—CONTINUED.

Setting aside fraudulent conveyances, see FRAUDULENT CONVEYANCES.

Vacation of judgment for fraud, see INFANTS.

Setting aside tax deed, see TAXATION, 4.

1. CANCELLATION OF INSTRUMENTS—EVIDENCE—SUFFICIENCY. The presumption that a deed of lands, sold for taxes, from the tax title grantee to the former owner's son-in-law, evidences the true state of the title, subject to an admitted right of use by the father-in-law and his wife, is not overcome by clear, cogent and convincing evidence, where it appears that the land was paid for by money borrowed upon a joint note secured on the personal property of each, that the son-in-law desired to preserve a home for the old people, who continued to live on the land and had the use of the same in consideration of the payment of the taxes, the son-in-law meanwhile making various improvements by building fences and buildings, without objection by the old people. *Marken v. Jacobs*..... 504

CARRIERS:

Remittance by mail as payment, see PAYMENT.

1. CARRIERS—INJURIES TO PASSENGERS—SETTING DOWN PASSENGERS—NEGLIGENCE—INSTRUCTIONS. In an action by a passenger on a street car, injured by the sudden starting of the car while he was alighting, it is error to instruct the jury that the defendant was liable for the slightest degree of negligence and that it was the duty of the defendant to deliver the plaintiff safely at his destination; and the error is not cured by further correct instructions as to defendant's liability in case the conductor, knowing that plaintiff was alighting, or by the exercise of extraordinary care could have known it, started the car while plaintiff was alighting and injured him. *Weksi v. Puget Sound Traction, Light & Power Co.*..... 404
2. CARRIERS—STREET CARS—EJECTION OF INTOXICATED PASSENGER—EVIDENCE—SUFFICIENCY. The conductor of a street car is justified in removing an intoxicated passenger where it appears that he repeatedly fell asleep, with his feet extending into the aisle and doorway where passengers must enter, the conductor made unsuccessful efforts to keep him awake, and he fell once or twice into the aisle of the car. *Backlund v. Puget Sound Traction, Light & Power Co.* 257
3. SAME—CARE IN EXPULSION—EVIDENCE—QUESTION FOR JURY. Liability for removing an intoxicated passenger from a street car in an unreasonable manner is sustained by evidence to the effect that the conductor took him from the car and dropped him upon the street, and then carried him out of the way of traffic and dropped his head and shoulders upon the sidewalk with his back across the curb, resulting in injury; the question being for the jury where there was conflicting evidence. *Backlund v. Puget Sound Traction, Light & Power Co.*..... 257

CAUSA MORTIS:

See GIFTS, 2.

CAUSES OF ACTION:

Joinder of, see ACTION.

CERTAINTY:

Of contract, see CONTRACTS, 1, 2.

Of markings on ballot, see ELECTIONS.

CERTIFICATE:

To statement of facts, see APPEAL AND ERROR, 14.

CERTIORARI:

1. CERTIORARI—TIME FOR APPLICATION. An application for a writ of certiorari must be made within the time for taking an appeal. *State ex rel. Neal v. Kauffman*..... 172

CESSATION OF CONTROVERSY:

On appeal, see APPEAL AND ERROR, 5-7.

CHANGE:

Of street grade, see MUNICIPAL CORPORATIONS, 2, 4, 5.

CHANGE OF VENUE:

Right to as class legislation, see CONSTITUTIONAL LAW, 2.

CHARACTER:

Duty to furnish discharged servant with certificate of, see MASTER AND SERVANT, 3.

Cross-examination as to immorality of witness, see WITNESSES, 3.

CHARGE:

To jury in criminal prosecutions, see CRIMINAL LAW, 3, 6.

To jury in civil actions, see TRIAL, 3-5.

CHATTEL MORTGAGES:

Preference by failing debtor to mortgagee, see FRAUDULENT CONVEYANCES, 7, 8.

1. CHATTEL MORTGAGES—VALIDITY—FAILURE TO RECORD. A chattel mortgage which was not filed as required by law until ten months after the death of one of the mortgagors, at which time the property had passed to the administratrix, is void as to creditors. *Spokane Merchants' Association v. First National Bank of Colville*.. 367
2. SAME—VALIDITY—PERSONS ENTITLED TO ATTACK. Creditors who have not acquired a specific right to or lien upon mortgaged chattels cannot question the validity of the mortgage as between the parties thereto. *Spokane Merchants' Association v. First National Bank of Colville* 367

CHATTEL MORTGAGES—CONTINUED.

3. **SAME.** In view of Rem. & Bal. Code, § 1483, providing that a judgment against an administrator only establishes the claim, and does not create a lien upon the property of the estate, creditors whose claims have been allowed and established have no such right to, or lien upon, chattels mortgaged by the deceased as to be entitled to question the validity of the mortgage as between the parties thereto. *Spokane Merchants' Association v. First National Bank of Colville* 367
4. **SAME—FORECLOSURE—TRANSFER.** Upon a judgment of foreclosure, a chattel mortgage is merged in the judgment and has no further validity. *Spokane Merchants' Association v. First National Bank of Colville* 367

CHILD:

Judgment against, vacation for fraud, see **INFANTS**.
Personal injury to child, see **NEGLIGENCE**.

CITIES:

See **MUNICIPAL CORPORATIONS**.

CITIZENS:

Privileges and immunities, see **CONSTITUTIONAL LAW**, 2.

CIVIL RIGHTS:

See **CONSTITUTIONAL LAW**, 1.

CLAIMS:

Against estate of incompetent person, see **INSANE PERSONS**, 2, 3.
Against city, see **MUNICIPAL CORPORATIONS**, 27-32.

CLASS LEGISLATION:

See **CONSTITUTIONAL LAW**, 2.

COLLATERAL ATTACK:

On judgment, see **JUDGMENT**, 8, 9.

COLLISION:

With automobile in city street, see **MUNICIPAL CORPORATIONS**, 17-21.
Between street car and vehicle, see **STREET RAILROADS**.

COMMERCE:

Carriage of goods and passengers, see **CARRIERS**.
Statutes in violation of interstate commerce act, see **STATUTES**, 3.

COMMISSION MERCHANTS:

Regulation of, validity of act, see **FACTORS**.

COMMISSIONS:

Of broker, see **BROKERS**.

COMMUNITY PROPERTY:

See **HUSBAND AND WIFE**, 1-4, 7.

Selection of homestead from, see **HOMESTEAD**, 1.

COMPENSATION:

Of broker, see **BROKERS**.

For property taken or damaged for public use, see **EMINENT DOMAIN**, 3, 4, 6-8.

Of attorney, see **MORTGAGES**.

Damages caused by public improvement, see **MUNICIPAL CORPORATIONS**, 2, 3, 5-7.

COMPLAINT:

In civil actions, see **PLEADING**, 7, 9.

COMPROMISE AND SETTLEMENT:

See **ACCORD AND SATISFACTION**.

CONCEALMENT:

Effect on limitation, see **LIMITATION OF ACTIONS**, 3.

CONCLUSIVENESS:

As against indemnitors of judgment against indemnitee, see **INDEMNITY**.

Of judgment, see **INFANTS**; **JUDGMENT**, 9-13.

CONDEMNATION:

Taking or damaging property for public use, see **EMINENT DOMAIN**.

CONDITION:

Precedent to action for unlawful detainer, see **LANDLORD AND TENANT**.

Precedent to action against city for damages, see **MUNICIPAL CORPORATIONS**, 27-32.

Precedent to patent for government lots, see **TAXATION**, 1.

In franchise to telephone company, see **TELEGRAPHS AND TELEPHONES**, 1, 3-7.

CONDITIONAL SALES:

See **SALES**, 4.

CONDUCT:

Of counsel at criminal prosecution, see **CRIMINAL LAW**, 2.

Of jury as ground for new trial, see **NEW TRIAL**, 1.

CONFESSIONS:

As evidence to establish *corpus delicti*, see **LARCENY**, 3.

CONFLICT OF LAWS:

Law governing contract, see **CONTRACTS**, 3, 4.

Laws governing usury, see **USURY**.

CONSIDERATION:

Of assignment, see **ASSIGNMENTS**.

For check or promissory note, see **BILLS AND NOTES**, 2-4.

For assignment of corporate stock, see **CORPORATIONS**, 2.

Of fraudulent conveyance, see **FRAUDULENT CONVEYANCES**, 3, 4.

Of guaranty, see **GUARANTY**.

CONSTITUTIONAL LAW:

Validity of act regulating commission merchants, see **FACTORS**.

Enactment and validity of statutes, see **STATUTES**.

1. **CONSTITUTIONAL LAW—CIVIL RIGHTS—RIGHT OF PRIVACY—CONVICTS.** The relation of the public to one convicted of crime is such as to forfeit whatever right of privacy the convict may have had with reference to the publication of his photograph, so far as protection to the public is concerned. *Hodgeman v. Olsen*..... 615
2. **CONSTITUTIONAL LAW—CLASS LEGISLATION—VENUE—CHANGE—BIAS OF JUSTICE.** Rem. & Bal. Code, § 1774, providing that defendant, upon filing an affidavit of prejudice before the justice of the peace before whom the action was instituted, has the right to a change of venue to the next nearest justice, is not unconstitutional as class legislation in that the state in a criminal action as the other party thereto, is not given the same right. *State ex rel. Lathrop v. Hauptly*..... 199
3. **CONSTITUTIONAL LAW—DUE PROCESS—HOMESTEADS—RIGHT TO—SELECTION—STATUTES.** The selection of a homestead under the act of 1895, Rem. & Bal. Code, § 558, by the filing of a declaration for record, whereby title is vested in the head of a family, is not a taking or deprivation of the property of the heirs without due process of law; since the declaration does not shut off judicial inquiry, and the state may provide the method of asserting the right of homestead without requiring that it be by way of judicial proceeding, as long as opportunity to be heard in the courts is open. *Stewart v. Fitzsimmons* 55

CONSTRUCTION:

Of order for payment of claim, see **BILLS AND NOTES**, 1.

Of contract, what law governs, see **CONTRACTS**, 3; **USURY**.

Of statutes relating to incest, see **INCEST**.

Of assignment of life insurance policy, see **INSURANCE**, 3.

Of ordinance regulating conduct of taxicab drivers, see **MUNICIPAL CORPORATIONS**, 9, 10.

Of complaint in action against city for damages, see **MUNICIPAL CORPORATIONS**, 33.

CONSTRUCTION—CONTINUED.

- Of statute empowering city to regulate use and control of streets, see **TELEGRAPHS AND TELEPHONES**, 1.
- Of instructions, see **TRIAL**, 3.
- Of statute requiring signature of testator to will, see **WILLS**, 2.

CONTEST:

- Of will, see **WILLS**.

CONTINUANCE:

- Review of discretion in ruling on, see **APPEAL AND ERROR**, 23.

1. **CONTINUANCE—ABSENCE OF PARTY—GROUNDS—SUFFICIENCY.** A continuance on account of the absence of the plaintiff is properly denied where the plaintiff knew the date when the case was set for trial, and went to Alaska without notifying his counsel, and there was no showing of the necessity of his going or when he would return. *Humphrey v. Mutual Life Ins. Co.*..... 672

CONTRACTORS:

- Bonds on public work, see **BONDS; MUNICIPAL CORPORATIONS**, 1.
- On public work, see **MUNICIPAL CORPORATIONS**, 12, 13, 22-25.

CONTRACTS:

- See **ACCORD AND SATISFACTION; ACCOUNT STATED; BILLS AND NOTES; BONDS; GUARANTY; SALES.**
- Assignment, see **ASSIGNMENTS.**
- By officer, personal liability, see **CORPORATIONS**, 3, 4.
- Between corporations, see **CORPORATIONS**, 5.
- Election of remedy on breach of, see **ELECTION OF REMEDIES.**
- Application of equitable maxim as varying written contract by parol evidence, see **EQUITY.**
- Parol evidence to vary written contract, see **EVIDENCE**, 5-7.
- For public improvements, see **MUNICIPAL CORPORATIONS**, 12.
- Of partner, ratification of, see **PARTNERSHIP**, 1.
- Stipulation in actions, see **STIPULATIONS.**
- Franchise for use of city streets, see **TELEGRAPHS AND TELEPHONES.**
- Sales of realty, see **VENDOR AND PURCHASER.**

1. **CONTRACTS—CERTAINTY—EXECUTED CONTRACTS—ACTIONS—DEFENSES.** Uncertainty and indefiniteness in a contract for a joint venture as to the financial aid and assistance which plaintiffs were to furnish the defendants in securing and prosecuting certain railroad construction work cannot be pleaded by defendants as a defense to an action to recover plaintiffs' share of the profits, where the contract had been fully executed and defendants had accepted the benefits, and nothing remained to be done except to make the final division of the profits. *McDougall v. McDonald*..... 334
2. **CONTRACTS—CERTAINTY—CORPORATIONS—AGREEMENT TO ORGANIZE.** An agreement to organize a corporation, with a stated capital stock,

CONTRACTS—CONTINUED.

- to be equally divided among the parties, each of whom agrees to forfeit \$2,500 in case of his default in completing the agreement, is not sufficiently definite in its terms to be binding to the extent of recovery of damages for its breach. *Weldon v. Degan*..... 442
3. CONTRACTS—WHAT LAW GOVERNS—CONFLICT OF LAWS—INTENT OF PARTIES—PRESUMPTION. Where a contract, the elements of which have their situs in different states, is silent with respect to the governing law, so far as express words are concerned, the intention of the parties controls, as inferred or presumed from the terms of the contract or circumstances attending the transaction; and if the contract be lawful in one state and unlawful in another, a lawful intent will be presumed if possible, and a construction adopted that will render the contract valid. *Crawford v. Seattle, Renton & Southern R. Co*..... 628
4. SAME—WHAT LAW GOVERNS—INTENT OF PARTIES—DETERMINATION. The technical making and required performance of a contract in one state is not controlling of the intention of the parties that the contract was made with reference to the laws of another state, where the elements of the contract had their situs in such other state, and the contract itself was silent as to the governing law. *Crawford v. Seattle, Renton & Southern R. Co*..... 628
5. CONTRACTS — WRITTEN CONTRACTS — MODIFICATION — EVIDENCE. A subsequent oral modification of a written contract for the construction of a building must be shown by clear and convincing evidence. *Armstrong v. Wheeler*..... 251
6. CONTRACTS—RESCISSION — GROUNDS — CLAIM OF DEFECT IN TITLE. Rescission of an agreement to furnish the money to purchase certain property is not warranted by the fact that certain bondholders had threatened to establish liens or title of some kind to the property, in the absence of evidence of any actual defect or *bona fide* claim sufficient to dispossess the purchaser, or at least to have had some substance and color in law or equity. *Lord v. Miller*..... 436
7. CONTRACTS—PERFORMANCE OR BREACH — EVIDENCE — ADMISSIBILITY. Upon an issue as to whether a shortage in a salmon pack was due to the fault of the plaintiff and his crew of packers, or to the failure of the defendant's machinery and equipment which he had agreed with plaintiff to furnish and keep in repair, evidence as to the defective and worn-out condition of the machinery at the beginning of the season and describing its then condition, and that it frequently broke down and failed to work properly, is admissible as tending to show defendant's breach of contract. *Lee Hong v. Schoenwald* 326
8. SAME—PERFORMANCE OR BREACH—ADMISSIONS AGAINST INTEREST—STATEMENT OF AGENT. In such a case, evidence of the statement

CONTRACTS—CONTINUED.

made by defendant's cannery foreman in charge of the plant, upon plaintiff's complaint as to the defective condition of the machinery, that it was left in bad condition the year before, and "no man in the United States could fix it," is an admission of defendant's *alter ego* against interest, and is not inadmissible as a mere expression of opinion. *Lee Hong v. Schoenwald*..... 326

CONTRIBUTORY NEGLIGENCE:

Of person killed by electric shock, see **ELECTRICITY**.
 Of person injured on street, see **MUNICIPAL CORPORATIONS**, 17-19, 21.
 Of minor injured by dynamite cap, see **NEGLIGENCE**, 2.
 Of person injured by street railroad, see **STREET RAILROADS**.

CONVEYANCES:

See **ASSIGNMENTS**; **CHATTEL MORTGAGES**; **MORTGAGES**.
 Administrator's sales, see **EXECUTORS AND ADMINISTRATORS**, 3-5.
 In fraud of creditors, see **FRAUDULENT CONVEYANCES**.
 Of community property to wife, see **HUSBAND AND WIFE**, 2.
 In trust, see **TRUSTS**.
 Contracts to convey, see **VENDOR AND PURCHASER**.

CONVICTS:

Right of privacy with reference to publication of photograph, see **CONSTITUTIONAL LAW**, 1.
 Right to compel destruction of photographs of, see **INJUNCTION**, 2.
 Mandamus to compel destruction of pictures taken of convict, see **MANDAMUS**.
 Powers of officers to take photographs and physical measurements of, see **REFORMATORIES**.

CORPORATIONS:

See **MUNICIPAL CORPORATIONS**.
 Agreement to organize, certainty of, see **CONTRACTS**, 2.
 Acquisition of property by condemnation, see **EMINENT DOMAIN**, 2, 5, 6-8.
 Usurious contract, what law governs, see **USURY**.
 1. **CORPORATIONS—STOCK—PLEDGE OF STOCK—EVIDENCE—SUFFICIENCY.**
 A pledge of mining stock as collateral security for advances made by one bank to another is sufficiently established by an indefinite oral agreement to the effect that the stock, left in possession of the pledgee, was to be held to protect the pledgee for advances made to the pledgor pending negotiations for an extensive credit or permanent loan, which failed of consummation; especially in view of the subsequent attitude of receivers of the pledgor, in litigation with the pledgee, whereby the receivers established by a judgment that the advances were made solely in consideration of such pledge of the

CORPORATIONS—CONTINUED.

stock as collateral security, which exceeded in value the amount of the advances; and thereafter, by virtue of such judgment and claim of collateral, the receivers contracted with the pledgee with reference to the stock on the assumption that it had been pledged and was held as collateral. *Dexter-Horton National Bank of Seattle v. Washington-Alaska Bank* 452

2. CORPORATIONS—TRANSFER OF STOCK—ASSIGNMENT—CONSIDERATION.

A credit on a loan to the assignor, is sufficient consideration for an assignment of mining stock, and it would be a sufficient consideration that the assignment was made as partial security for the loan. *Clough v. Monro*..... 507

3. CORPORATIONS—REPRESENTATION—CONTRACTS—OFFICERS—PERSONAL LIABILITY—EVIDENCE—AMBIGUITY—PAROL EVIDENCE.

Where a guaranty of the payment of drafts was written on the letter-head of a bank showing the names of its officers, and was signed "O. B. Woolley, manager," but contained nothing to show that the bank was bound, it is *prima facie* the personal undertaking of Woolley on the theory that "manager" was only *descriptio personae*; but the fact that it was written upon the letter-head and the word "manager" attached, creates sufficient ambiguity to admit of parol evidence to overcome the presumption, the burden being upon plaintiff in an action on the guaranty. *Griffin v. Union Savings and Trust Co.* 605

4. SAME—REPRESENTATION—CONTRACTS—OFFICERS—PERSONAL LIABILITY.

The fact that the manager of a bank had no authority to guarantee drafts on behalf of the bank, is some evidence that he did not intend to bind the bank in giving a guaranty on a bank letter-head and appending his official title of "manager" after his signature. *Griffin v. Union Savings and Trust Co.*..... 605

5. CORPORATIONS—ACTIONS AGAINST—VENUE—"TRANSACTING BUSINESS"—ACTS OF AGENT—PRINCIPAL AND AGENT.

A waterway company, having state contracts for filling state tide lands, is not, as between the parties, an agent of a trust company, with whom it contracted for floating the state certificates received in payment of the fills, so as to make its acts under the contract with the trust company (such as sending out notices, making collections and remitting the proceeds, performed in King county) the acts of the trust company, having its domicile and transacting its business in Spokane county; and the trust company is not "transacting business" in King county by reason of the acts of the waterway company in performing such contract, within the meaning of Rem. & Bal. Code, § 206, authorizing a corporation to be sued in any county in which it is "transacting business" at the time; although the trust company's officers were frequently temporarily in King county to consult with the waterway company concerning the certificates; since

CORPORATIONS—CONTINUED.

the contract between them for floating the bonds was an independent contract creating no relation of principal and agent. *State ex rel. Seattle & Lake Washington Waterway Co. v. Superior Court*.... 657

CORPUS DELICTI:

Proof of, see LARCENY, 1, 3.

CORROBORATION:

Of accomplices, see CRIMINAL LAW, 1.

Of female in prosecution for rape, see RAPE, 2-4.

COSTS:

Deposit in court to cover costs as payment working cessation of appeal, see APPEAL AND ERROR, 5.

Personal liability of officer for, see MUNICIPAL CORPORATIONS, 11.

1. COSTS—ON APPEAL. Where appellants sought a community as well as a personal judgment against a married woman, and on appeal were awarded judgment against the community only, the respondent wife is entitled to recover her costs. *Williams v. Hitchcock* 536

COUNTIES:

Condemnation for highway through limits of city, see EMINENT DOMAIN, 1.

COURTS:

Review of decisions, see APPEAL AND ERROR; CERTIORARI.

Mandate to compel correction of supplement to statement of facts, see APPEAL AND ERROR, 14.

Condemnation proceedings, see EMINENT DOMAIN.

Judges, see JUDGES.

Prohibition to courts, see PROHIBITION.

Province of court and jury, see TRIAL, 2.

Trial by court without jury, findings, see TRIAL, 6, 7.

1. COURTS—SUPREME COURT—ORIGINAL JURISDICTION—PROHIBITION—AMOUNT IN CONTROVERSY. The supreme court has no jurisdiction to control, by writ of prohibition, the superior court in an action in which the superior court has jurisdiction of the subject-matter, where the amount involved is less than \$200, and the case does not fall within any of the exceptions to the limitation of the jurisdiction of the supreme court contained in Const., art. 4, § 4. *State ex rel. Prentice v. Superior Court*..... 90

CREDIT:

On warrant paid contractor for public work, right of city, see MUNICIPAL CORPORATIONS, 23, 25.

CREDITORS:

- Right to sue on bond of subcontractor on public work, see **BONDS**.
 Rights as to chattel mortgage by debtor, see **CHATTEL MORTGAGES**.
 Conveyances in fraud of, see **FRAUDULENT CONVEYANCES**.
 Payment of debt by garnishee to debtor's creditor, see **GARNISHMENT**, 2.
 Rights as to conditional sale contracts, see **SALES**, 4.

CRIMINAL LAW:

- See **GAMING; INCEST; LARCENY; RAPE**.
 Right of defendant to change of venue for bias of justice as class legislation, see **CONSTITUTIONAL LAW**, 2.
 Adequacy of criminal process as bar to injunction, see **INJUNCTION**, 1.
 Violation of statute against blacklisting, see **MASTER AND SERVANT**, 4.
 Reformatories, see **REFORMATORIES**.
1. **CRIMINAL LAW—EVIDENCE—ACCOMPLICES—CORROBORATION.** A conviction may be sustained on the uncorroborated testimony of an accomplice, without any precautionary instruction, if none was requested. *State v. Engstrom*..... 499
 2. **CRIMINAL LAW—TRIAL—MISCONDUCT OF COUNSEL—ARGUMENT.** Prejudicial error cannot be based on misconduct of state's counsel in argument to the jury which did not pass beyond the bounds of legitimate argument, and much of which was called out in reply to improper argument on the part of counsel for accused. *State v. Engstrom* 499
 3. **CRIMINAL LAW—TRIAL—ARGUMENTATIVE INSTRUCTIONS.** Upon a prosecution for gambling, supported by evidence of hired detectives, a requested instruction is properly refused as argumentative, where it directs greater care by the jury in weighing the testimony of persons who are interested because of the natural and unavoidable tendency and bias of mind of such persons to construe everything against the accused and disregard everything not supporting their preconceived opinions. *Everett v. Simmons*..... 276
 4. **CRIMINAL LAW—TRIAL—HABITUAL CRIMINALS—PROCEDURE—DIFFERENT JUDGES—SENTENCE.** Under Rem. & Bal. Code, § 2178, of the habitual criminal statute, which provides that the court shall . . . before sentence impanel a jury to try the fact of former conviction, the principal case may be tried by one of the judges, and the supplemental charge of being an habitual criminal may be tried by another judge of the same court, although the statute makes no provision for trials by separate judges; and either judge may consider both verdicts in determining the sentence. *State v. Driscoll*.... 245
 5. **SAME—HABITUAL CRIMINALS—SENTENCE.** Under Rem. & Bal. Code, § 2178, of the habitual criminal statute, requiring the supplemental charge of being an habitual criminal to be tried before sentence in

CRIMINAL LAW—CONTINUED.

- the principal case, it is not necessary to pronounce judgment before a trial is had upon the supplemental proceeding, although the trials are had before different judges. *State v. Driscoll*..... 245
6. CRIMINAL LAW—APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS TO INSTRUCTIONS. Error cannot be based upon the refusal or failure of the trial court to give an instruction on the subject of the testimony of an accomplice, where the record falls to show any exceptions called to the attention of the court at or before the motion for a new trial was heard. *State v. Engstrom*..... 499
7. CRIMINAL LAW—APPEAL—REVIEW—VERDICT. A conviction will not be set aside because against the weight of the evidence, if supported by testimony, no matter how improbable, if there be a possibility that it is true. *State v. Newall*..... 75
8. CRIMINAL LAW—APPEAL—REVIEW—HARMLESS ERROR. Error in receiving the statement of a witness that accused first denied his guilt, but afterwards admitted it, is cured where the witness immediately stated the exact language of the accused. *State v. Hess* 240

CROPS:

Assignment of trust fund for labor claimants, see ASSIGNMENTS.

CROSS-EXAMINATION:

See WITNESSES, 2, 3.

DAMAGES:

- Compensation for property taken or damaged for public use, see EMINENT DOMAIN, 3, 4, 6-8.
- For interference with fishing rights, see FISH.
- For publication of libel, see LIBEL AND SLANDER, 1, 3.
- For blacklisting servant, see MASTER AND SERVANT, 1-4.
- Injuries caused by public improvements, see MUNICIPAL CORPORATIONS, 2, 3, 5-7.
- Torts of city, see MUNICIPAL CORPORATIONS, 16.
- Filing claims against city for, see MUNICIPAL CORPORATIONS, 27-32.
- Parties entitled to maintain action for, see PARTIES.
- For injury to partnership business, see PARTNERSHIP, 2, 3.
- For sale under junior writ, see SHERIFFS AND CONSTABLES, 2.
1. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$2,750 for the loss by a boy, eleven years of age, of the first two joints of the thumb and the first two fingers is not so excessive as to indicate prejudice or other illegal motives. *Davis v. Wenatchee* 13
2. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$310 for injuries sustained in the ejection of an intoxicated passenger from a street car is not excessive, where the plaintiff, a blacksmith, earning \$3.50 a day, claimed an injury to his back, he

DAMAGES—CONTINUED.

did not work for seven or eight weeks, and then received but \$3 per day, and there was some evidence of pain and suffering. *Backlund v. Puget Sound Traction, Light & Power Co.*..... 257

3. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$4,000, reduced by the trial court to \$3,000, for severe cuts, bruises, and personal injuries sustained by a man and wife, causing much pain and suffering and permanent injuries to the wife's back, knee, and nervous system, when they were struck by an automobile going twenty or twenty-five miles an hour, and thrown and dragged thirty or forty feet, although seemingly large, will not be set aside on appeal as excessive where it cannot be said to be the result of passion or prejudice or any illegal influence. *Tooker v. Perkins*..... 567

DEATH:

Caused by electric shock, see **ELECTRICITY**.

Gifts *causa mortis*, sufficient delivery of, see **GIFTS**, 2.

Wrongful death of servant, see **MASTER AND SERVANT**, 5-7.

Wrongful death caused by operation of street railroad, see **STREET RAILROADS**.

DEBT:

Debts of estate, application of property in payment of, see **EXECUTORS AND ADMINISTRATORS**, 1.

Community debts, see **HUSBAND AND WIFE**, 3-7.

DEBTOR AND CREDITOR:

See **FRAUDULENT CONVEYANCES**.

DECEDENTS:

Estates, see **EXECUTORS AND ADMINISTRATORS**.

DECISION:

Decisions reviewable, see **APPEAL AND ERROR**, 1-8.

On appeal, see **APPEAL AND ERROR**, 36-39.

DECLARATIONS:

As proof of agency, see **PRINCIPAL AND AGENT**, 4.

DEEDS:

Cancellation, see **CANCELLATION OF INSTRUMENTS**.

In fraud of creditors, see **FRAUDULENT CONVEYANCES**, 1-3.

Sufficient delivery to constitute gift, see **GIFTS**, 1.

Tax deeds, vacation, see **TAXATION**, 4.

Validity of trust deed, what law governs, see **USURY**.

DEFINITENESS:

Of contract, see **CONTRACTS**, 1,2.

In pleading, objections to want of, see **PLEADING**, 1.

DELAY:

In moving for judgment, effect, see JUDGMENT, 1.

DELIVERY:

Of property by garnishee, see GARNISHMENT, 1.

Of gift, see GIFTS.

Of assigned policy, see INSURANCE, 2.

Of money in mails, presumption of ownership, see PAYMENT.

DEMAND:

As condition precedent in action for unlawful detainer, see LANDLORD AND TENANT.

DEMURRER:

To complaint for failure to allege filing of claim against city for damages, see MUNICIPAL CORPORATIONS, 30, 32.

In pleading, see PLEADING, 1, 4.

DENIALS:

In pleading, see PLEADING, 3, 4.

DESCENT AND DISTRIBUTION:

See HOMESTEAD, 2.

DESTRUCTION:

Mandamus to compel destruction of pictures taken of convict, see MANDAMUS.

DILIGENCE:

In discovery of fraud, see LIMITATION OF ACTIONS, 2.

DIRECTING VERDICT:

In civil actions, see TRIAL, 2.

DISCHARGE:

From indebtedness, see ACCORD AND SATISFACTION.

Publication and circulation of false reasons for discharge of employee, see LIBEL AND SLANDER; MASTER AND SERVANT, 1-4.

DISCOVERY:

Trial by jury in action for, see JURY.

Of fraud as bar to action, see LIMITATION OF ACTIONS, 2.

DISCRETION OF COURT:

Review of on appeal, see APPEAL AND ERROR, 23-26.

Amendment of complaint, see PLEADING, 7.

DISMISSAL AND NONSUIT:

Dismissal of appeal, see APPEAL AND ERROR, 2, 6-8.

Dismissal of appeal on ground of cessation of controversy as *res judicata*, see JUDGMENT, 11.

DISMISSAL AND NONSUIT—CONTINUED.

1. **DISMISSAL AND NONSUIT—FAILURE TO AMEND—ISSUES UNDETERMINED.** Where the plaintiff alleged three several items of damages from breach of contract, and was ordered to make the complaint more definite and certain in one particular only, it is error, on motion to strike the amended complaint for failure to properly comply with the order, to dismiss the action, since an issue was tendered as to the other items. *Williams v. Lindenger Packing Co.*... 292
2. **DISMISSAL AND NONSUIT—FAILURE TO AMEND—ISSUES.** Where a motion to strike an amended complaint alleging two several items of damage was treated as a demurrer to one of the items, failure to plead over does not subject the plaintiff to a dismissal, as for contumacy in refusing to comply with the order to strike; since he was entitled to go to trial on the remaining items. *Williams v. Lindenger Packing Co.*..... 292

DISTRIBUTION:

Of estate, see **EXECUTORS AND ADMINISTRATORS**, 2.

DIVISION:

Of property on divorce, see **DIVORCE**.

DIVORCE:

Judgment against sureties on bond on affirmance of decree, see **APPEAL AND ERROR**, 38.

As affecting insurable interest of wife, see **INSURANCE**, 1.

1. **DIVORCE—DIVISION OF PROPERTY—EVIDENCE — SUFFICIENCY.** Upon granting a divorce to a wife on the ground of cruelty and failure to properly provide for her and the children, an award to the wife of property of the value of \$24,800, leaving the husband property of the value of \$71,500, will be upheld, where consideration of the needs and circumstances of the parties appears to warrant the division, and the trial court had the advantage of seeing the parties and hearing them testify. *Williams v. Williams*..... 113

DOCUMENTS:

As evidence in civil actions, see **EVIDENCE**, 4.

DUE PROCESS OF LAW:

See **CONSTITUTIONAL LAW**, 3.

Act regulating commission merchants as constituting denial of, see **FACTORS**, 1.

DYNAMITE:

Injury to minor from dynamite cap left on street, see **MUNICIPAL CORPORATIONS**, 14, 15.

Injury to minor from explosion of dynamite cap, see **NEGLIGENCE**, 2.

EJECTION:

Of passenger, see **CARRIERS**, 2, 3.

EJECTMENT:

1. **EJECTMENT—PROCESS—JURISDICTION.** The special summons authorized in unlawful detainer is insufficient to confer jurisdiction in ejectment. *Jeffries v. Spencer*..... 133
2. **EJECTMENT—LEASED PREMISES—EXPIRATION OF TERM.** An action of unlawful detainer of leased premises cannot be upheld as an action of ejectment where the term had not expired. *Jeffries v. Spencer* 133

ELECTION:

Between causes of action, see **ACTION**.

By prosecution as to manner of commission of offense, see **GAMING**.

ELECTION OF REMEDIES:

1. **ELECTION OF REMEDIES—VENDOR AND PURCHASER—CONTRACT—BREACH—INCONSISTENT CONCURRENT ACTIONS.** Where a vendor brought suit for the first installment due upon a contract for the sale of land, and prior to trial, prosecuted to judgment a second suit to forfeit the contract and quiet title for nonpayment of the second installment, the second action was an election of remedies and an abandonment of the previous pending action for the securing of unpaid purchase money; since the remedies were inconsistent and cannot be presented concurrently as accumulative remedies. *Rose v. Rundall* 422

ELECTIONS:

Stipulation for production and recount of ballots in election contest, effect, see **STIPULATIONS**.

1. **ELECTIONS—BALLOTS—MARKING—CERTAINTY.** A ballot designating the voter's choice by a cross in the space opposite a candidate's name is not rendered void for uncertainty by the insertion of a zero in the space opposite the name of the candidate's opponent; since the voter's choice reasonably appears from the face of the ballot, under Rem. & Bal. Code, §§ 4905 and 4927, providing for counting such ballots. *State ex rel. Hufford v. Eddings*..... 233
2. **SAME—BALLOTS—MARKING—DISTINGUISHING MARKS.** The insertion of a zero, opposite the name of the opponent of a candidate, voted for by making a cross in a space opposite his name, is not such a distinguishing mark as to invalidate the ballot, within Rem. & Bal. Code, § 4914; since it does not appear that it was intended as a distinguishing mark or was made in willful violation of the law. *State ex rel. Hufford v. Eddings*..... 233

ELECTRICITY:

1. **ELECTRICITY—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.** A farmer, moving a hay derrick underneath high power electric wires, was guilty of contributory negligence, precluding any recovery for his death, where he drove the derrick against telephone wires with such force as to draw the poles together and cause high power lines above to sag and come in contact with the derrick, it being evident that the clear way might not be sufficient, and from past experience he was aware of the danger of contact, and where, after the contact was established and obvious, instead of having the current cut off, he approached, over the protest and warning of others, to within a foot of a charged cable, and within two or three feet of a log chain which was spitting fire, and received a shock of electricity through a hemp rope which he had attached to the charged derrick in an attempt to lower it. *Druse v. Pacific Power & Light Co.*..... 519

EMINENT DOMAIN:

Public improvements by municipalities, see **MUNICIPAL CORPORATIONS**, 3-8.

1. **EMINENT DOMAIN—RIGHT TO CONDEMN—COUNTIES—STATUTES.** A county may construct permanent highways through the corporate limits of cities of the third and fourth class and for that purpose condemn the necessary right of way, where the city by ordinance has authorized it, under 3 Rem. & Bal. Code, §§ 5879-18 and 5879-19, providing that the county may construct such roads, and pay or aid the city to pay for the condemnation of rights of way, if the city is unable to pay for the same, and *Id.*, § 5879-8, providing that the county commissioners, when necessary for straightening . . . or improving any permanent highway, may take the necessary right of way by condemnation proceedings. *State ex rel. Floyd v. Superior Court* 410
2. **EMINENT DOMAIN—BY CITIES—PURPOSES—GARBAGE.** Under the express provisions of Rem. & Bal. Code, ch. 17 (§ 7768), a city is empowered to condemn land for garbage incinerators and dumping grounds. *Hoquiam v. Lenhart*..... 625
3. **EMINENT DOMAIN—TAKEN OR DAMAGED.** The right to make a fill and slope upon lands abutting on a street, is a "damaging" of the property, as distinguishable from a "taking," as used in Const., art. 1, § 16; since where both terms are used, "damaged" covers injuries where there is no direct taking of the land itself. *Milwaukee Terminal R. Co. v. Seattle*..... 102
4. **SAME—COMPENSATION—DAMAGES—EVIDENCE—SUFFICIENCY.** In eminent domain proceedings to condemn the right to fill abutting lands to support a street, in which the court instructed the jury that, in determining the damages, it must be assumed that the de-

EMINENT DOMAIN—CONTINUED.

defendant would have no right to remove the fill, evidence of two experts that there would be no damage, based on the assumption that the defendant could remove the fill, is insufficient to sustain a verdict of no damages, as the instruction became the law of the case; especially where defendant's evidence showed actual damages in a substantial sum, and the city filed no stipulation conferring upon the defendant the right to excavate the fill and support the street by a retaining wall or abutment. *Milwaukee Terminal R. Co. v. Seattle* 102

5. SAME—PROCEEDINGS—PETITION. In condemnation proceedings by a city to acquire a location for garbage incinerators and dumping grounds, it is not necessary to state in the petition that provision has been made for payment of the award; since, by Rem. & Bal. Code, § 7784, possession may be taken only on payment of the judgment. *Hoquiam v. Lenhart*..... 625
6. SAME — PROCEEDINGS — POSSESSION — DAMAGES — ACCOUNTING — EARNINGS PRIOR TO PAYMENT. Upon the condemnation of a water system of a public service corporation, under Rem. & Bal. Code, §§ 7783, 7784, entitling the city to take possession upon the payment of the jury's award of damages, the city is not entitled to an accounting of the earnings and profits of the condemned property previous to the payment of the money, although, upon such payment, the title relates back to the date of the award. *State ex rel. Washington Public Service Co. v. Superior Court*..... 155
7. EMINENT DOMAIN—PROCEEDINGS—APPEAL—BOND—NECESSITY. Under the general condemnation act, Rem. & Bal. Code, § 931, providing that no bond on appeal shall be required of any person interested in the property sought to be condemned, an appeal or supersedeas bond is not required upon appeals from an award of damages in condemnation proceedings, and the general statute of appeals, Id., § 1721, requiring a bond on appeal to make the appeal effectual does not apply. *State ex rel. Washington Public Service Co. v. Superior Court* 155
8. SAME—PROCEEDINGS—COMPENSATION — APPEAL — POSSESSION PENDING APPEAL. Upon the condemnation of a water system of a public service corporation, the city electing to finance the acquisition under Rem. & Bal. Code, § 8008, without recourse to a general indebtedness, by creating a special fund derived from gross revenues and the issuance of bonds and warrants against the special fund, in which the jury awarded damages in the sum of \$88,500, while the bond issue authorized by the vote of the people amounted to but \$90,000, it cannot be assumed, on appeal from the award, that, upon a reversal and a new trial, a second verdict might be rendered in excess of the legally authorized indebtedness for which the property owner would have no redress, but it must be presumed until the contrary

EMINENT DOMAIN—CONTINUED.

is shown that the trial by jury was fair and regular; hence Const., art. 1, § 16, guaranteeing that no property shall be taken or damaged without just compensation having been first made or paid into court and ascertained by a jury, is not violated by Rem. & Bal. Code, § 7783, providing that no appeal shall delay the proceedings if the city shall pay the amount of the award into court and that the city shall be liable to the owner for any further compensation that may be finally awarded to the party appealing, and § 7784, authorizing the city to take possession upon payment of the award; hence the property owner, on appealing from the award, is not entitled to a writ of prohibition staying the proceedings until the final hearing on the appeal. *State ex rel. Washington Public Service Co. v. Superior Court* 155

EMPLOYEES:

See MASTER AND SERVANT.

ENTRY:

Of judgment, see JUDGMENT, 3-6.

EQUITY:

See ACCOUNT; CANCELLATION OF INSTRUMENTS; FRAUDULENT CONVEYANCES; INJUNCTION; TRUSTS.

Review in equitable actions, see APPEAL AND ERROR, 12, 21.

Relief against after entry, see JUDGMENT, 7.

Right to jury trial in equitable actions, see JURY.

1. EQUITY—MAXIMS. The maxim, *Id certum est quod certum reddi potest*, cannot be applied to supply by parol that which the law presumes to have been purposely omitted from a written contract. *Weldon v. Degan*..... 442

ESTATES:

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.

Of incompetent persons, see INSANE PERSONS, 2, 3.

Trusts, see TRUSTS.

ESTOPPEL:

By judgment, see JUDGMENT, 9-13.

Of judgment creditor to reinstate judgment after sale of exempt property on execution and satisfaction of judgment, see JUDGMENT, 14.

Of city by accepting benefits under invalid contract, see MUNICIPAL CORPORATIONS, 13.

Of city in action on local improvement warrant, see MUNICIPAL CORPORATIONS, 23, 25.

To question validity of receivership proceedings, see RECEIVERS, 2.

ESTOPPEL—CONTINUED.

- Of sureties to question validity of bond of receiver, see **RECEIVERS**, 8, 4.
- To claim title to property, see **REPLEVIN**, 1.

EVIDENCE:

- See **FRAUDULENT CONVEYANCES**, 2, 3, 6; **LARCENY**.
- Incorporation in record on appeal, see **APPEAL AND ERROR**, 9, 10.
- Harmless error in rulings on, see **APPEAL AND ERROR**, 28-33; **CRIMINAL LAW**, 8.
- Of assignment of fund for labor claimants for harvesting crops, see **ASSIGNMENTS**.
- Parol evidence to explain written order, see **BILLS AND NOTES**, 1.
- Procuring cause of sale, see **BROKERS**.
- To overcome presumption of title as shown by deed, see **CANCELLATION OF INSTRUMENTS**.
- Ejection of intoxicated passenger, see **CARRIERS**, 2, 3.
- To show subsequent oral modification of contract, see **CONTRACTS**, 5.
- Performance or breach of contract, see **CONTRACTS**, 7, 8.
- Of pledge of corporate stock, see **CORPORATIONS**, 1.
- Personal liability of officer in giving guaranty, see **CORPORATIONS**, 3.
- In criminal prosecutions, see **CRIMINAL LAW**, 1.
- Contributory negligence of person killed by electric shock, see **ELECTRICITY**.
- Condemnation proceedings, see **EMINENT DOMAIN**, 4.
- Fraud in settlement of estate, see **EXECUTORS AND ADMINISTRATORS**, 2.
- Fraud of executor in purchasing at own sale, see **EXECUTORS AND ADMINISTRATORS**, 3-5.
- In prosecution for gambling, see **GAMING**.
- Of delivery to constitute gift *causa mortis*, see **GIFTS**, 2.
- Consideration for guaranty, see **GUARANTY**.
- To show community nature of debt, see **HUSBAND AND WIFE**, 5.
- In action to recover share of profits of joint venture, see **JOINT ADVENTURES**.
- Of payment of city warrant, see **MUNICIPAL CORPORATIONS**, 24.
- Negligence in care of appliance dangerous to children, see **NEGLECT**, 1.
- Of value of good will in action for loss of by partnership, see **PARTNERSHIP**, 3.
- Admissibility of evidence under pleading, see **PLEADING**, 5, 8.
- Failure of proof, see **PLEADING**, 9, 10.
- Of agent's authority, see **PRINCIPAL AND AGENT**, 1, 2.
- Agency, see **PRINCIPAL AND AGENT**, 4.
- In prosecution for rape, see **RAPE**.
- Ownership of property, see **REPLEVIN**.
- Of levy of attachment, see **SHERIFFS AND CONSTABLES**, 3.
- For personal injuries to driver of vehicle, see **STREET RAILROADS**.
- Assessment of property at market value, see **TAXATION**, 3.

EVIDENCE—CONTINUED.

- In rebuttal, scope of, see TRIAL, 1.
 - Instructions as to preponderance of, see TRIAL, 5.
 - Fraud of vendor in sale of land, see VENDOR AND PURCHASER, 1.
 - Adverse use of waters by lower proprietor, see WATERS AND WATER COURSES, 2.
 - Testamentary capacity, see WILLS, 1.
 - Testimony of witnesses, see WITNESSES.
1. EVIDENCE—JUDICIAL NOTICE. The supreme court takes notice of the fact that the superior court of King county is composed of several judges. *State v. Driscoll*..... 245
 2. EVIDENCE—JUDICIAL NOTICE. Judicial notice will be taken of the custom of penal institutions to take and preserve photographs and measurements of prisoners. *Hodgeman v. Olsen*..... 615
 3. EVIDENCE—OTHER TRANSACTIONS—FRAUD—GENERAL SCHEME. In an action to recover for fraud practiced upon a street contractor in selling sand and gravel, through the manipulation of a duplicating pad of delivery slips and receipts, whereby two receipts were obtained for a single delivery, resulting in overpayments, it is admissible to prove that the defendant had defrauded another street contractor in the same way at about the same time; since it reasonably authorizes the inference that each of the frauds was in pursuance of a general scheme and proceeded from the same motive. *Ryan v. Dowell* 76
 4. EVIDENCE—DOCUMENTARY EVIDENCE—DUPLICATES—COMPARISONS—FRAUD. In an action for fraud in manipulating a delivery pad so as to produce duplicate receipts for a single delivery, resulting in overpayments, the slips delivered to plaintiff are admissible for the purpose of comparison by the jury. *Ryan v. Dowell*..... 76
 5. EVIDENCE—PAROL EVIDENCE—TO VARY WRITING. Where a written contract for the exchange of properties provided that the plaintiff might elect to take cash instead of a mortgage for the balance due him, it is inadmissible to show a further oral agreement that in case of such election, plaintiff was to execute a deed of his property to enable the defendant to borrow money thereon to make the cash payment; since the same adds a provision to the contract covering a subject-matter mentioned therein. *Olsen v. Nichols*..... 185
 6. EVIDENCE—PAROL EVIDENCE—TO VARY WRITING—AMBIGUITY. A written contract to construct the cement walls of the basement of a building in a "first-class workmanlike manner" is not ambiguous, but has a well defined meaning; hence it is inadmissible to show by parol that the walls were agreed to be so constructed as to prevent water from leaking through them. *Armstrong v. Wheeler*. 251
 7. EVIDENCE—PAROL—TO VARY WRITING. Where a written agreement to organize a corporation is lacking in everything other than the purpose of the organization, the amount of capital stock, and the

EVIDENCE—CONTINUED.

proportion in which it was to be contributed, resort cannot be had to oral evidence of a prior or contemporaneous agreement supplying the statutory essentials for the formation of a corporation prescribed by Rem. & Bal. Code, § 3879. *Weldon v. Degan*..... 442

EXAMINATION:

Of witnesses in general, see **WITNESSES**.

EXCEPTIONS:

Necessity for purpose of review, see **CRIMINAL LAW**, 6.

EXCEPTIONS, BILL OF:

Necessity for purpose of review, see **APPEAL AND ERROR**, 10, 12.

EXCESSIVE DAMAGES:

See **DAMAGES**.

EXECUTION:

Reinstatement of judgment against debtor after vacation of abortive sale, see **JUDGMENT**, 14.

Sale under junior execution, see **SHERIFFS AND CONSTABLES**, 1, 2.

Of will by testator, see **WILLS**, 2.

1. **EXECUTION—SALES—TITLE—SALE UNDER JUNIOR EXECUTION.** Sales of personal property under a junior execution will convey good title, and the proceeds under a junior writ must be applied to the satisfaction of a senior writ. *Continental Distributing Co. v. Hays*.. 300

EXECUTORS AND ADMINISTRATORS:

Rights as to chattel mortgage by deceased, see **CHATTEL MORTGAGES**, 3.

1. **EXECUTORS AND ADMINISTRATORS—PROPERTY SUBJECT TO ADMINISTRATION—APPLICATION TO DEBTS.** Where a widow, believing in good faith that all of the estate had been given to her, used her own money, together with community funds on deposit in a bank constituting the entire community estate, to pay the debts of the estate and funeral expenses, which exceeded the amount of the deposit, the deposit is not subject to administration at the suit of an heir, all debts having been paid; since it was applied as the law requires it to be applied. *Sponogle v. Sponogle*..... 649
2. **EXECUTORS AND ADMINISTRATORS—DECREE OF DISTRIBUTION—VACATION—FRAUD—EVIDENCE—SUFFICIENCY.** The settlement of an estate by a decree entered after citation and notice by publication, when the minor, her guardian, and her attorney were present in court, will not be set aside on allegations of fraud and collusion with her attorney, where there was no evidence of the collusion, evidence that the decree was entered in accordance with a prior settlement was circumstantial, and the burden of establishing the fraud was not sustained. *Veysey v. Veysey*..... 553

EXECUTORS AND ADMINISTRATORS—CONTINUED.

3. EXECUTORS AND ADMINISTRATORS—SALES—VALIDITY—PURCHASE BY EXECUTOR—CONSTRUCTIVE FRAUD—EVIDENCE—SUFFICIENCY. The executor, by procuring a sale of the real estate to pay debts without giving the court an opportunity to determine the advisability of remortgaging the land, is guilty of a constructive fraud upon the heirs, where it appears that the bulk of the remaining indebtedness was represented by a mortgage for the sum of \$1,750; that, upon being advised that he must find a purchaser, he represented that his son, who was just 21 and without means, would buy the property, and cash for the bid was procured by arrangements for a new mortgage, the property was bid in by the son for the appraised value, \$2,000, and father and son gave a new mortgage for the amount, secured upon the property sold and other property belonging to the father; that the son paid no consideration, made the bid at his father's request, received no part of the rents and profits, and later conveyed the land to his father without consideration; since, in the absence of statute, an executor may not bid at his own sale, and since the transaction amounted merely to a change of mortgages and transfer of title to the executor; and since, in his fiduciary relation, when he could not sell to any one but himself, equity required and he owed the duty, under Rem. & Bal. Code, §§ 1503, 1505, to allow the court to examine witnesses and determine whether it was for the best interests of the estate to sell or to remortgage the property for the purpose of paying the mortgage indebtedness. *Stewart v. Baldwin* 63
4. SAME—CONSTRUCTIVE FRAUD—NOTICE. A constructive fraud by an executor in indirectly purchasing at his own sale, arises irrespective of his motive or any moral wrong; and the fraud need not be proved by strong convincing evidence, slight circumstances being sufficient in view of his duty as trustee. *Stewart v. Baldwin*... 63
5. EXECUTORS AND ADMINISTRATORS — SALES — FRAUD OF EXECUTOR — EVIDENCE—SUFFICIENCY. The fact that an executor's sale of one-half of the stock in a corporation was made for \$2,900 and that a few months thereafter the purchaser resold the stock for \$3,520 to the executor, who owned the other half, is not sufficient alone to establish fraud; it appearing that the purchaser was an entire stranger at the time of the sale, which was made in good faith without any arrangement for the executor's benefit. *Veysey v. Veysey*..... 553

EXHIBITS:

As part of record on appeal, see APPEAL AND ERROR, 10.

EXPLOSIVES:

See NEGLIGENCE, 2.

Injury to minor from dynamite caps left on street, see MUNICIPAL CORPORATIONS, 14, 15.

FACTORS:

Act regulating commission merchants, see **STATUTES**, 1-3.

1. **FACTORS—STATUTES—REGULATION—CONSTITUTIONAL LAW—DUE PROCESS—LIBERTY—POLICE POWERS.** The commission merchants' act, Rem. & Bal. Code, § 7024-7035, directed against a class of factors or merchants whose principal business is that of selling farm, dairy, orchard and garden products on commission, who are defined as commission merchants and required to procure a license and furnish a bond, is a proper exercise of the police power of the state for the protection of health, safety, morals and welfare and the prevention of fraud, and hence does not violate any of the state or constitutional restrictions with respect to interference with liberty, equality, or the rights of property. *State v. Bowen & Co.*..... 23
2. **SAME—STATUTES—STRINGENCY OF ACT.** The validity of the act is not subject to objection by reason of the stringency and difficulty of its requirements. *State v. Bowen & Co.*..... 23
3. **SAME—REGULATION—LICENSE.** The fact that the main features of the act are the prevention of fraud, does not invalidate the provision requiring a license, since regulation by license is appropriate. *State v. Bowen & Co.*..... 23
4. **SAME—REGULATION—BONDS.** The requirement of a surety company bond in the sum of \$3,000 in order to obtain a license, is not unreasonable and invalid. *State v. Bowen & Co.*..... 23

FAILURE OF PROOF:

See **PLEADING**, 9, 10.

FEES:

Of attorney on foreclosure of mortgage, see **MORTGAGES**.

FELLOW SERVANTS:

See **MASTER AND SERVANT**, 6, 7.

FILING:

Of chattel mortgage for record, see **CHATTEL MORTGAGES**, 1.

Claims against city for damages, see **MUNICIPAL CORPORATIONS**, 27-32.

FINAL JUDGMENT:

Appealability, see **APPEAL AND ERROR**, 3, 4.

FINDINGS:

Review of on appeal, see **APPEAL AND ERROR**, 18-21.

By court in civil actions, see **TRIAL**, 6, 7.

FISH:

1. **FISH—FISHING LOCATION—DAMAGES.** Damages for interference with rights under a drag seine fishing license cannot be recovered where drag seine fishing at the location in question was unlawful and would constitute a misdemeanor. *Harper v. Grasser*..... 475

FOOD:

Sales of impure food, variance, see **PLEADING**, 10.

FORECLOSURE:

Of mortgage, see **CHATTEL MORTGAGES**, 4.

Of lien, see **MECHANICS' LIENS**.

Of mortgage, see **MORTGAGES**.

FORFEITURE:

Of insurance, see **INSURANCE**, 4.

Of telephone franchise, see **TELEGRAPHS AND TELEPHONES**, 5-7.

FORMER ADJUDICATION:

See **JUDGMENT**, 9-13.

FRANCHISE:

For use of city streets, see **TELEGRAPHS AND TELEPHONES**.

FRAUD:

See **BILLS AND NOTES**, 4; **FRAUDULENT CONVEYANCES**; **SALES**, 2, 3.

As inducing overpayments in settlements, see **ACCOUNT STATED**.

Evidence of other transactions, see **EVIDENCE**, 3.

Documentary evidence for comparison by jury, see **EVIDENCE**, 4.

In settlement of estate, see **EXECUTORS AND ADMINISTRATORS**, 2.

Of executor in purchasing at own sale, see **EXECUTORS AND ADMINISTRATORS**, 3-5.

Vacation of judgment for, see **INFANTS**.

Accrual of action for, see **LIMITATION OF ACTIONS**, 2.

Action to cancel tax deed for fraud, limitations, see **TAXATION**, 4.

Sales of realty, see **VENDOR AND PURCHASER**, 1.

FRAUDULENT CONVEYANCES:

1. **FRAUDULENT CONVEYANCES—HUSBAND AND WIFE—CREDITORS.** Upon an issue as to whether a deed from husband to wife, presumptively fraudulent as to creditors, under Rem. & Bal. Code, § 5229, was made in good faith, unliquidated claims for damages or an existing right of action upon a contingent claim do not stand upon the same footing as would be given to existing acknowledged or contract debts. *Petrovitsky v. Smith*..... 151
2. **SAME—HUSBAND AND WIFE—EVIDENCE—SUFFICIENCY.** Where a husband had no debts except an unliquidated demand, his deeds to his wife and children of certain property, for the expressed consideration of one dollar, are sufficiently shown to have been made in good faith, where it appears that, at the time the houses were built on the lots, it was agreed that one should be given to the children and one to the wife, that the wife had reared and educated the children largely through her own efforts, and with the children had paid back taxes and street assessments, and renewed a mortgage, and she had

FRAUDULENT CONVEYANCES—CONTINUED.

put in \$500 received as a legacy from a friend, and the husband, living separate and apart, had contributed but little to the family support; the only suspicious circumstance being that the deeds were not promptly recorded. *Petrovitsky v. Smith*..... 151

3. FRAUDULENT CONVEYANCES—TRANSACTION BETWEEN HUSBAND AND WIFE—EVIDENCE—SUFFICIENCY. A transaction whereby a husband and wife, just prior to entry of judgment against them on a community debt in the sum of \$2,700, formed a corporation, in which the wife was the sole stockholder, and conveyed to it all their community property together with separate property of the wife, all of the estimated value of \$12,000, for the purpose, as claimed, of raising money to pay the husband's debt of about \$1,300 and to secure the wife for \$3,200 rents of her separate property collected by the husband, must be regarded as a conveyance by the husband to the wife, and the burden of establishing the good faith of the transaction, as upon a sufficient consideration, by clear, cogent, and convincing evidence, is not met, where it appears that the property, if pledged at all, was pledged only as security for the \$1,300 indebtedness, evidenced by a note which was a community debt, that the husband could give no accounting of the rents claimed to have been received, all or part of which were disbursed for living and family expenses for which the wife was primarily liable, the corporation was managed by the husband, and the wife did not testify in her own behalf; especially in view of the badge of fraud in that the value of the property transferred was disproportionate to the sum for which it was alleged to be pledged. *Peterson v. Badger State Land Co.*... 530

4. FRAUDULENT CONVEYANCES—BETWEEN HUSBAND AND WIFE—GIFT OR PREFERENCE. Where a husband conveyed all his community property to a corporation, formed for the purpose of holding it for his wife, who was the sole stockholder, equity will look to the intent, and regard it as a gift to the wife, rather than a preference, where the value of the property is so disproportionate to the alleged claim of the wife as to constitute a badge of fraud. *Peterson v. Badger State Land Co.*..... 530

5. SAME—TITLE OF FRAUDULENT GRANTEE. In such a case, the wife, whether in person or by the corporation, is presumed to be a trustee, holding the legal title for the community. *Peterson v. Badger State Land Co.*..... 530

6. SAME—BURDEN AND DEGREE OF PROOF. As against creditors of the husband, the burden of establishing the good faith of his conveyance to his wife is upon the party asserting the good faith, under Rem. & Bal. Code, § 5292; and the proofs must be clear, cogent, and convincing. *Peterson v. Badger State Land Co.*..... 530

7. FRAUDULENT CONVEYANCES—PREFERENCES—RIGHT TO MAKE—TO MORTGAGEES—VALIDITY OF MORTGAGE—APPEALS—MOOT QUESTION. Where failing debtors in good faith gave a preference to mortgagees

FRAUDULENT CONVEYANCES—CONTINUED.

under a chattel mortgage, which covered future additions to the stock and allowed possession by the mortgagors and sales in the course of trade, the validity of the mortgage, through the failure to apply all the proceeds of sales in extinguishment of the debt, is a moot question; since preferences by failing debtors are valid. *Dantels v. Pacific Brewing & Malting Co.*..... 416

8. **SAME—PREFERENCES—SALES IN BULK—STATUTES.** A preference by a failing debtor by the transfer of a stock of goods, does not fall within the sales-in-bulk act, Rem. & Bal. Code, § 5296, requiring an affidavit and list of creditors upon sales of stocks of merchandise in bulk; since there is no sale, within the meaning of the act, where no purchase money passed. *Dantels v. Pacific Brewing & Malting Co.* 416

FUNDS:

Misappropriation of, right of taxpayer to bring suit against state, see STATES.

GAMING:

Instructions in prosecution for gambling, see CRIMINAL LAW, 3.

1. **GAMING—CRIMINAL PROSECUTION — ELECTION — INSTRUCTIONS — ISSUES NOT PRESENTED.** Under a general information charging gambling, which admitted of proof of guilt either as owner, employee, or one who played in the game, proof of the accused's direct personal participation in the game in a building leased by him is in the nature of an election; and upon the defense of an alibi, it is error to instruct the jury that they may convict if the accused did conduct or carry on the game "by himself or through any other person;" since there was no issue presented as to the accused's constructive participation and no opportunity to meet such charge. *Everett v. Simmons* 276
2. **SAME — CRIMINAL PROSECUTIONS — EVIDENCE — SUFFICIENCY.** Evidence of a witness that he played poker in defendant's pool room but did not remember seeing defendant present at the time, is insufficient to support a conviction of gambling; as it is as consistent with innocence as guilt. *Everett v. Simmons*..... 276

GARBAGE:

Condemnation of location for city garbage incinerator, see EMINENT DOMAIN, 2, 5.

GARNISHMENT:

1. **GARNISHMENT—PROTECTION OF GARNISHEE'S LIEN—ATTORNEY AND CLIENT—LIEN FOR SERVICES.** Where a garnishee defendant had, as an attorney, the possession of and a lien upon the note which was the subject of controversy between the principal parties, upon de-

GARNISHMENT—CONTINUED.

termining the title to the note, it is error to order delivery of the note subject to the attorney's lien, to be paid to the garnishee when the note is paid; and the order for delivery should first provide for payment of the attorney's lien. *Wise v. Reed*..... 11

2. **GARNISHMENT—DEFENSES—PAYMENT TO DEBTOR'S CREDITOR.** Where the garnishee was indebted to the judgment debtor at the time of the service of the writ, it is no defense to the writ that the garnishee subsequently paid the money to a *bona fide* creditor of the judgment debtor. *Anderson v. Garrison*..... 307

GIFTS:

From husband to wife, see **FRAUDULENT CONVEYANCES**, 4.
To wife of community property, see **HUSBAND AND WIFE**, 2.
Of trust estate, rights of donee, see **TRUSTS**, 2.

1. **GIFTS—DELIVERY—DEED AND BILL OF SALE.** Where a deed and bill of sale from a husband to his wife was delivered to her as a gift at the time of execution, there is a sufficient delivery to support the gift without manual delivery of the property. *Sponogle v. Sponogle* 649
2. **GIFTS—CAUSA MORTIS—DELIVERY—SUFFICIENCY.** There was no sufficient delivery of checks, drafts, notes and certificates of deposit, contained in a safety deposit box, to constitute a valid gift *causa mortis*, where the donor and her sister, the donee, visited the vault and took the box and contents into a booth, and replaced the papers, which were not so bulky that they could not have passed from hand to hand, and the donor then informed the manager that she was going to a hospital for an operation, and in case she did not come back, the contents "are to be delivered" to the donee, stating to her "here are the keys; in case I do not come back, you know what to do;" and informing the manager that she made the donee "a partner in the box"; since the delivery was not as perfect and complete as the nature and circumstances of the property permitted. *Newsome v. Allen* 678

GOOD FAITH:

In transfer of property, see **FRAUDULENT CONVEYANCES**, 1-3, 6, 7.

GOOD WILL:

Action by partnership for loss of, see **PARTNERSHIP**, 3.

GRADE:

Change of street grade, see **MUNICIPAL CORPORATIONS**, 2, 4, 5.

GRANTS:

Shore land grants, rights of owners, see **NAVIGABLE WATERS**, 1.
Of public lands, see **PUBLIC LANDS**.

GUARANTY:

Personal liability of officer in guaranteeing payment of drafts, see CORPORATIONS, 3, 4.

1. **GUARANTY—CONSIDERATION — EVIDENCE — SUFFICIENCY.** Consideration moving to a bank for a guaranty, by its manager, of drafts to be made by a mining company, is not shown by a prior agreement made by the manager with two of the persons interested in the mining company, and who were owners of a mill company that was largely indebted to the bank, whereby such owners agreed, upon selling their interests in the mining company to pay over the proceeds of such sale to the bank or its manager; especially where the existence of such agreement was kept secret from the bank's officers, and was not mentioned in the guaranty, and the guaranty was not given because of it. *Griffin v. Union Savings and Trust Co.*..... 605

GUARDIAN AND WARD:

Judgment against guardian and community as community debt, see HUSBAND AND WIFE, 6.

Guardianship of insane person, see INSANE PERSONS.

Admissions in pleading as to appointment of guardian, see PLEADING, 3.

HABITUAL CRIMINALS:

See CRIMINAL LAW, 4, 5.

HARBOR LINE:

As limiting fixed title of shore land owner, see NAVIGABLE WATERS, 1.

HARMLESS ERROR:

In civil actions, see APPEAL AND ERROR, 28-35.

In criminal prosecution, see CRIMINAL LAW, 8.

HIGHWAYS:

Condemnation by county through limits of city, see EMINENT DOMAIN, 1.

HOMESTEAD:

Right of selection as taking of property without due process, see CONSTITUTIONAL LAW, 3.

As separate property of spouse, see HUSBAND AND WIFE, 1.

Title and subject of act relating to, see STATUTES, 4.

1. **HOMESTEAD—SELECTION — FROM COMMUNITY PROPERTY—RIGHT OF SURVIVING HUSBAND.** The act of 1895, Rem. & Bal. Code, § 558, providing for the selection of a homestead by the husband or other head of a family, by executing and acknowledging a declaration to be filed of record, authorizing the husband, after the wife's death, to select a homestead for the benefit of himself and family out of the community property, vesting title in him in fee; and the act

HOMESTEAD—CONTINUED.

supersedes that part of Rem. & Bal. Code, § 1465, requiring a "setting aside" of a homestead by the probate court where none had been claimed by "the head of a family in his lifetime." *Stewart v. Fitzsimmons* 55

2. HOMESTEAD — SELECTION — EFFECT ON TITLE OF HEIRS — DESCENT AND DISTRIBUTION—STATUTES. Construing in *pari materia* the acts of 1895, pp. 197, and 109 (Rem. & Bal. Code, §§ 1366, 528 *et seq.*), the former vesting the title to real estate in the heirs upon the death of the ancestor without decree of distribution, and the latter defining a homestead and providing for the manner of selection, the acts are not inconsistent, but the heirs take the property *cum onere*, and subject to existing laws and the right of the surviving heirs to claim a homestead out of the property. *Stewart v. Fitzsimmons* 55

HUSBAND AND WIFE:

See DIVORCE.

Conveyances between, see FRAUDULENT CONVEYANCES, 1-6.

Rights of survivor, see HOMESTEAD, 1.

Resulting trust in community estate, see TRUSTS.

1. HUSBAND AND WIFE — COMMUNITY PROPERTY — PUBLIC LANDS — HOMESTEAD ENTRY. Lands patented to a married man who made homestead entry while single, are his separate property. *Card v. Cerini* 419
2. HUSBAND AND WIFE—COMMUNITY PROPERTY—GIFT TO WIFE. By Rem. & Bal. Code, § 8766, a conveyance of community property from husband to wife makes it her separate property. *Sponogle v. Sponogle* 649
3. HUSBAND AND WIFE—COMMUNITY PROPERTY—LOAN TO WIFE. The loan of money to a wife to purchase a hotel business, while living with her husband, although he was away much of the time and she ran the hotel, constitutes a community debt. *Fielding v. Kettler* 194
4. HUSBAND AND WIFE—COMMUNITY PROPERTY—LIABILITY FOR DEBTS —NOTE OF HUSBAND. Where a note signed by one of the trustees of a corporation was given to defray expenses in securing a contract for the corporation, which, if secured, would promote a sale of the community property of the trustee, the note was the community debt of the trustee and his wife. *Peter v. Hensen*..... 413
5. SAME—COMMUNITY DEBTS—INTEREST OF COMMUNITY—EVIDENCE—ADMISSIBILITY. Upon an issue as to whether a note, made by a trustee of a corporation to defray expenses in its behalf and to promote a sale of his community property, was a community debt, the articles of incorporation, executed by him as a trustee, are admissible in evidence to show his relation to the corporation. *Peter v. Hensen* 413

HUSBAND AND WIFE—CONTINUED.

6. HUSBAND AND WIFE—GUARDIANS—ACTIONS — JUDGMENT — COMMUNITY OR SEPARATE DEBT. A judgment upon a community debt against the wife of an insane person "as guardian of the estate of her husband, M. . . . and against the marital community" of the two, is not a personal judgment against the wife enforceable against her separate estate. *Clough v. Monro*..... 507
7. HUSBAND AND WIFE — COMMUNITY PROPERTY—LIABILITY—SURETYSHIP. A receiver's bond signed as surety by the husband as a plaintiff in an action to prevent the dissipation of the assets of a corporation, one-half of the stock of which was the community property of himself and wife, was given for the benefit of the community estate, and was therefore a community debt without execution of the bond by the wife. *Williams v. Hitchcock*..... 536
8. HUSBAND AND WIFE — ALIENATION OF AFFECTIONS—COMPLAINT—CHARGE OF ADULTERY. In an action for alienation of affections of plaintiff's wife, the complaint does not charge an act of adultery, where it merely alleges a conspiracy to bring the wife to W. for immoral purposes, and that she occupied a room in a hotel with one of the defendants for about an hour on a certain night. *Kenworthy v. Richmond*..... 127
9. SAME — ALIENATION OF AFFECTIONS — INSTRUCTIONS — CHARGE OF ADULTERY. In an action for the alienation of the affections of plaintiff's wife, it is error to give an instruction upon the subject of the commission of adultery when there was no evidence thereof other than proof of opportunity in that the wife had occupied a room with such defendant for about an hour one night, and then retired therefrom; since the rule requires proof of an adulterous disposition on the part of both, as well as proof of opportunity. *Kenworthy v. Richmond* 127

IDENTIFICATION:

Of prisoners, see REFORMATORIES.

IMPEACHMENT:

Of verdict by affidavit of jurors, see NEW TRIAL, 1.

Of witness, see WITNESSES, 3.

IMPROVEMENTS:

Liens, see MECHANICS' LIENS.

Public improvements, see MUNICIPAL CORPORATIONS, 1-8, 12-15, 22-26.

Outside inner harbor line, see NAVIGABLE WATERS, 2.

INCEST:

1. INCEST — "KIN" — STATUTES — CONSTRUCTION. Rem. & Bal. Code, § 2455, defining incest as sexual intercourse between persons nearer of kin to each other than second cousins, whether of the half or whole blood, refers only to blood relations and not kindred by affin-

INCEST—CONTINUED.

- ity; hence a man cannot be guilty of committing the offense with his stepdaughter. *State v. Bielman*..... 460
2. **INCEST—STATUTES—REPEAL—CONSTRUCTION.** Rem. & Bal. Code, § 7151, prohibiting marriage in specified cases of kinship by affinity as well as by consanguinity, and defining incest as carnal knowledge between such persons, is repealed, so far as the subject of incest is concerned, by the penal code of 1909, which, by Id., § 2304, expressly repealed an earlier law (Id., §§ 2891, 2892) defining incest as sexual commerce between persons related within the degrees wherein marriage is prohibited; in view of Id., § 2455, of the penal code defining incest as being when the parties are nearer of kin than second cousins, thereby eliminating relationship by affinity, and § 2301 of the penal code declaring that no law is continued in force because it is consistent with this act on the same subject, but that, in all cases provided for by this act, all former statutes, whether consistent or not, are repealed unless expressly continued in force. *State v. Bielman* 460
3. **INCEST—DEFINITION—STATUTES—COMMON LAW.** Rem. & Bal. Code, § 2455, defining incest as being when the parties were nearer of kin to each other than second cousins, excludes prosecutions under the common law. *State v. Bielman*..... 460

INDEMNITY:

See **GUARANTY.**

Bond of subcontractor on state work, parties entitled to sue, see **BONDS.**

Bond of sheriff, action on, see **SHERIFFS AND CONSTABLES, 3.**

1. **INDEMNITY — JUDGMENT AGAINST INDEMNITEE — CONCLUSIVENESS—SHERIFFS—INDEMNITY BOND.** Where a sheriff is sued for wrongful attachment, and gives the indemnitors notice and full opportunity to defend, in the absence of fraud or mistake, judgment against the sheriff is conclusive as between him and the indemnitors on the question of the sheriff's liability and the facts necessary to sustain it; but where two writs were in the hands of the sheriff, judgment against the sheriff would not be conclusive that the writs had been levied, since levy of both writs was not essential to the judgment. *National Surety Co. v. Fry Co.*..... 118
2. **INDEMNITY—JUDGMENT AGAINST INDEMNITORS—CONCLUSIVENESS—SHERIFFS.** A judgment against a sheriff for wrongful attachment, is conclusive against the indemnitors in the attachment bond, where the writ was actually levied on their demand and they had notice of the original action and were tendered the defense, irrespective of whether they accepted the defense made and participated therein. *National Surety Co. v. Fry Co.*..... 118

INDEPENDENT CONTRACTORS:

On public work, see **MUNICIPAL CORPORATIONS, 12, 13,**

INDORSEMENT:

Of interest on note as consideration for notes for overdue interest, see **BILLS AND NOTES**, 3.

INFANTS:

Contributory negligence on part of children, see **NEGLIGENCE**, 2.

1. **INFANTS—JUDGMENTS—CONCLUSIVENESS — VACATION — FRAUD.** A consent judgment, after a hearing on evidence, compromising a suit on behalf of minors, duly represented by guardian *ad litem*, will not be set aside for constructive fraud, in that a known material witness was not produced by the guardian; since there is no distinction between decrees in favor of adults and infants duly represented, and fraud to set aside a judgment must be actual and positive, and clearly and satisfactorily proved. *Burke v. Northern Pac. R. Co.* 37

INJUNCTION:

1. **INJUNCTION — ACTIONS—ISSUES AND RELIEF—REMEDY AT LAW—CRIMINAL PROCESS.** In an action to enjoin certain acts of police officers in the enforcement of an ordinance regulating solicitation by taxicab and other drivers, it is error, in granting the relief sought, to enter a decree enjoining the plaintiff from soliciting passengers and baggage for hire in any other manner or places than that fixed by the ordinance, where the defendant had asked no such relief, and where the enforcement of the ordinance by criminal process is a sufficient protection against violation of the ordinance. *Seattle Taxicab & Transfer Co. v. Seattle*..... 594
2. **INJUNCTION—RELIEF—PAST INJURY.** It not being the function of an injunction to correct past injuries, injunction does not lie to compel the destruction of photographs taken of a convict, in the absence of an allegation that the defendant is now threatening to make wrongful use of the same. *Hodgeman v. Olsen*..... 615

INSANE PERSONS:

1. **INSANE PERSONS—ACTIONS AGAINST—GUARDIANS—PROCESS.** Under Rem. & Bal. Code, § 1670, authorizing service of process upon the guardian of an incompetent, an action against an incompetent may be brought in form, and entitled in the caption, against the guardian as such. *Clough v. Monro*..... 507
2. **SAME—ACTIONS AGAINST—LIMITATION.** Rem. & Bal. Code, § 1477, requiring suits on claims against estates of decedents within three months after rejection of the claims does not apply by analogy to claims against the estate of an incompetent person, and the same are not barred three months after rejection. *Clough v. Monro*.. 507
3. **INSANE PERSONS—ACTIONS—AUTHORITY OF GUARDIAN—ADMISSIONS.** The guardian of an incompetent person, defending an action on a claim against the estate, has power, when acting in good faith, to

INSANE PERSONS—CONTINUED.

admit the presentation and rejection of a claim therefor, the facts being within the personal knowledge of the guardian. *Clough v. Monro* 507

INSOLVENCY:

Of fraudulent grantor, preference as to creditors, see **FRAUDULENT CONVEYANCES**, 7, 8.

INSTRUCTIONS:

Harmless error in giving or refusing, see **APPEAL AND ERROR**, 34, 35.
 In criminal prosecutions, see **CRIMINAL LAW**, 3, 6.
 In civil actions, see **TRIAL**, 3-5.

INTENT:

Of parties as to law governing contract, see **CONTRACTS**, 3, 4; **USURY**.
 Fraudulent, see **FRAUDULENT CONVEYANCES**, 4.

INTEREST:

See **USURY**.
 Validity of notes given by officers of bank for overdue interest on note held by bank, see **BILLS AND NOTES**, 2-4.
 Admissions against by agent, see **CONTRACTS**, 8.
 On local improvement warrant, see **MUNICIPAL CORPORATIONS**, 26.
 Real party in interest, see **PARTIES**, 1.

INTERSTATE COMMERCE:

See **STATUTES**, 3.

INSURANCE:

1. **INSURANCE—INSURABLE INTEREST OF WIFE—DIVORCE.** Where a wife had an insurable interest at the time her husband assigned to her a policy of insurance upon his life, the existence of an insurable interest at the maturity of the policy is unnecessary, and her interest in the policy does not expire upon the procurement of a divorce. *Humphrey v. Mutual Life Ins. Co.*..... 672
2. **INSURANCE—ASSIGNMENT OF POLICY—DELIVERY.** There is a valid and complete assignment and delivery of a life insurance policy by a husband to his wife, where the assignment was executed in duplicate and one copy attached to the policy and placed in safety deposit boxes to which the wife had access and the other copy sent to the insurance company, where it was received and filed. *Humphrey v. Mutual Life Ins. Co.*..... 672
3. **INSURANCE—ASSIGNMENT OF POLICY—CONSTRUCTION.** Upon an assignment of his life insurance policy by a husband "to his wife, if living, and if not to my estate," the wife cannot, without the husband's consent, surrender the policy and receive the cash surrender value. *Humphrey v. Mutual Life Ins. Co.*..... 672

INSURANCE—CONTINUED.

4. **INSURANCE—ACCIDENT INSURANCE—POLICY—WAIVER OF CONDITIONS—ACCEPTANCE OF OVERDUE PREMIUMS.** An accident policy did not lapse for failure of the insured to pay the premium monthly in advance, as required by the policy, where it appears that the insurance company employed a collector who for three years had called on the first day of the month or shortly thereafter and collected and receipted for the premiums; that the money was always ready for him when he called, and was ready on the first day of the last month, but the collector did not call for it until the third of the month, the insured having died the day before; since a course of conduct had been established upon which the insured had a right to rely. *Boutin v. National Casualty Co.*..... 372

IRRIGATION:

Adverse use of waters for, see **WATERS AND WATER COURSES.**

ISSUES:

In civil actions, see **PLEADING**, 9, 10.

JOINDER:

Of causes of action, see **ACTION.**

JOINT ADVENTURES:

1. **JOINT ADVENTURES—PROFITS—EVIDENCE—ADMISSIBILITY.** In an action to recover a share of the profits of a joint venture, evidence of the value of defendants' services is properly excluded where the court found, on sufficient evidence, that they were not to receive compensation for personal services. *McDougall v. McDonald.*.. 334

JUDGES:

Prohibition to restrain acts of, see **PROHIBITION**, 1-4.

1. **JUDGES—POWERS—EXERCISE BEYOND TERRITORIAL LIMITS—VISITING JUDGES.** Rem. & Bal. Code, § 42, expressly authorizes a judge of one county who sits in a case in any other county out of the district to determine the cause and render judgment in any other county in the state. *State ex rel. Calhoun v. Superior Court.*..... 492
2. **JUDGES—JURISDICTION—VISITING JUDGES—LOSS OF JURISDICTION.** In a receivership proceeding, in which issues had been referred to a visiting judge for trial, subsequent proceedings and orders in the receivership by the regular judge, such as acting on claims, does not deprive the visiting judge of the power to act upon the matters submitted to him. *State ex rel. Calhoun v. Superior Court.*..... 492

JUDGMENT:

Review, see **APPEAL AND ERROR.**

Presumptions as to entry of judgment *non obstante*, see **APPEAL AND ERROR**, 22.

JUDGMENT—CONTINUED.

- Against sureties on affirmance of decree of divorce, see **APPEAL AND ERROR**, 38, 39.
- Foreclosure of chattel mortgage, see **CHATTEL MORTGAGES**, 4.
- Decree of distribution of estate of decedent, see **EXECUTORS AND ADMINISTRATORS**, 2.
- Upon community debt, see **HUSBAND AND WIFE**, 6.
- Against indemnitee, conclusiveness, see **INDEMNITY**.
- Against infants, conclusiveness, see **INFANTS**.
- For rescission of contract of sale, see **SALES**, 3.
- Non obstante*, power of court, see **TRIAL**, 2.

- 1. **JUDGMENTS—TIME FOR RENDITION—DELAY.** Delay in moving for judgment after the court has announced its conclusions does not work a loss of jurisdiction, the adverse parties having remained silent. *State ex rel. Calhoun v. Superior Court*..... 492
- 2. **JUDGMENT—NOTWITHSTANDING VERDICT—TIME FOR MOTION.** A motion for judgment notwithstanding the verdict of a jury is not timely when not made until after entry by the clerk of judgment upon the verdict, after which only a motion for a new trial may be entertained. *Carkonen v. Columbia & Puget Sound R. Co.*..... 473
- 3. **SAME—ENTRY — CLERK'S JOURNAL — JUDGMENT NOTWITHSTANDING VERDICT—TIME FOR MOTION.** Under Rem. & Bal. Code, § 431, providing that the clerk shall immediately enter judgment in conformity to the verdict, but that the granting of a new trial shall operate as a vacation of the judgment, the clerk's journal entry of judgment upon a verdict entered as of the date when the verdict was rendered, constitutes a valid judgment as of that date, notwithstanding that the entry was not actually made for several days, and that, meanwhile, a motion for a new trial and for judgment notwithstanding the verdict were made; hence such motion for judgment was too late, not having been made until after judgment on the verdict. *Paich v. Northern Pac. R. Co.*..... 379
- 4. **JUDGMENT—NOTWITHSTANDING VERDICT—TIME FOR ENTRY.** After the entry of judgment upon the verdict of a jury, the superior court is without power to entertain a motion for judgment notwithstanding the verdict, its power to correct its own errors being limited to the statutory right of granting a new trial. *Paich v. Northern Pac. R. Co.*..... 379
- 5. **JUDGMENT—NOTWITHSTANDING VERDICT—TIME FOR ENTRY.** After the entry of judgment upon the verdict, the court is without power, upon motion for judgment notwithstanding the verdict or in the alternative for a new trial, to order the judgment reduced unconditionally, which was in effect granting the motion for judgment after entry of a final judgment in the case; its power being limited to granting the motion for a new trial, unconditionally, or upon the condition of remitting part of the verdict. *McDonnell v. Shine* 393

JUDGMENT—CONTINUED.

6. SAME—ENTRY—FORM—CLERK'S JOURNAL. The clerk's journal entry of judgment "in favor of plaintiff and against the defendant in accordance with the verdict," is sufficient in form to constitute a judgment where it immediately follows the journal entry of the verdict, which specified the amount of the recovery. *Paich v. Northern Pac. R. Co.*..... 379
7. JUDGMENTS—VACATION—EQUITABLE RELIEF—LIMITATIONS. The superior court has jurisdiction, upon a proper showing, to grant relief in equity against a judgment, after the expiration of one year from the date of its entry. *State ex rel. Prentice v. Superior Court.*.. 90
8. JUDGMENT—COLLATERAL ATTACK. Judgment in an action of replevin, by a court of a sister state having jurisdiction of the subject-matter and of the person of the only defendant named as vendee in a bill of sale of the property, which determined the title to the property to be in the plaintiff, cannot be collaterally attacked by one claiming to have an interest with defendant as one of the vendees, even though the judgment be erroneous. *Fleming v. Langley.*.. 346
9. JUDGMENT—BAR—MOTION TO VACATE—COLLATERAL ATTACK. An order denying a motion to vacate a judgment is a bar to a subsequent proceeding by motion or independent action seeking the same relief; and the bar would be applicable to creditors of an estate who were not parties but had the right to appear in the action against the administratrix and move for the relief afterwards sought by them in an independent action. *Spokane Merchants' Association v. First National Bank of Colville.*..... 367
10. JUDGMENT—CONCLUSIVENESS—BAR—IMPLIED TRUSTEE. Judgment in favor of a trustee by implication of law is not a bar to the right of any one who had become subrogated to maintain a subsequent action, where the trustee failed to account. *Broderick v. Puget Sound Traction, Light & Power Co.*..... 399
11. JUDGMENTS—RES JUDICATA—DISMISSAL—MERITS. The dismissal of an appeal upon the ground of cessation of the controversy, without passing on the merits or affirming the judgment, either in the opinion or in the remittitur, is not an affirmation of the judgment or an adoption of it so as to make it a judgment of the supreme court, or *res judicata* or immune from attack or interference in the lower court. *State ex rel. Prentice v. Superior Court.*..... 90
12. JUDGMENT—RES JUDICATA—MATTERS CONCLUDED. Where receivers of an insolvent bank impounded money in transit that had been sent to a creditor bank to apply on overdrafts and advances, a judgment in favor of the receivers, based on their claim that the advances had been made on the sole consideration of mining stock theretofore pledged therefor and then held by the creditor bank as collateral security exceeding in value the amount of the advances, is conclusive

JUDGMENT—CONTINUED.

that the mining stock had been pledged by the insolvent as collateral for the advances, and precludes the receivers from making a contrary claim in subsequent litigation to foreclose the pledge. *Dexter Horton National Bank of Seattle v. Washington-Alaska Bank*.. 452

13. **JUDGMENT—RES JUDICATA—ISSUES CONCLUDED.** Where a judgment had been satisfied by a sale of an exempt homestead, and the debtor sued to set aside the sale, a proceeding to reinstate the judgment is not barred by a general judgment in the debtor's action quieting the debtor's title to the homestead, where the single issue presented was whether the homestead declaration was sufficient to exempt the property from the lien of the judgment; since the scope of the decree is limited to the issues presented. *Calhoun, Denny & Ewing v. Quinlan* 547

14. **JUDGMENT—SATISFACTION—REINSTATEMENT—ABORTIVE SALE—ESTOPPEL.** A sale on execution to the judgment creditor of property which was exempt as a homestead, and satisfaction of the judgment thereby, does not preclude a reinstatement of the judgment, after the debtor had the sale set aside and rendered abortive in an action to remove the cloud from the title. *Calhoun, Denny & Ewing v. Quinlan* 547

JUDICIAL NOTICE:

In civil actions, see **EVIDENCE**, 1, 2.

JUDICIAL SALES:

On execution, see **EXECUTION**.

Of property of decedent, see **EXECUTORS AND ADMINISTRATORS**, 3-5.

JURISDICTION:

See **MANDAMUS**; **PROHIBITION**.

Appellate jurisdiction, see **APPEAL AND ERROR**, 1-8.

Particular courts, see **COURTS**.

Sufficiency of process in ejectment, see **EJECTMENT**, 1.

Of visiting judge, see **JUDGES**.

JURY:

Instructions in criminal prosecutions, see **CRIMINAL LAW**, 3, 6.

Affidavits of, on motion for new trial, see **NEW TRIAL**, 1.

Misconduct as ground for new trial, see **NEW TRIAL**, 1.

Verdict in civil actions, see **TRIAL**, 2.

Instructions in civil actions, see **TRIAL**, 3-5.

1. **JURY—JURY TRIAL—RIGHT TO.** An action in its essence for a discovery and accounting is of equitable cognizance and triable to the court without a jury. *Veysey v. Veysey*..... 553

JUSTICES OF THE PEACE:

Right to change of venue for bias of as class legislation, see **CONSTITUTIONAL LAW**, 2.

KNOWLEDGE:

As affecting bar of statute, see **LIMITATION OF ACTIONS**, 1.

That articles were purchased with stolen money, see **REPLEVIN**.

LANDLORD AND TENANT:

1. **LANDLORD AND TENANT—UNLAWFUL DETAINER—CONDITIONS PRECEDENT—PROVISION IN LEASE—NOTICE.** Demand and notice to quit is a condition precedent to an action against a tenant for unlawful detainer, under Rem. & Bal. Code, § 812, requiring notice and giving three days' grace thereafter, and the same is not excused by a clause in the lease providing for its termination at the lessor's option on default in payment of the rent for thirty days after due; nor by the fact that waste is charged. *Jeffries v. Spencer*..... 133

LANDS:

See **PUBLIC LANDS**.

LAPSE:

Of insurance policy, see **INSURANCE**, 4.

LARCENY:

Recovery of stolen property, see **REPLEVIN**.

1. **LARCENY—CORPUS DELICTI—EVIDENCE—SUFFICIENCY.** In a prosecution for the theft of money belonging to C., the *corpus delicti* is sufficiently shown by proof that the money was in the trunk where C. had placed it that morning, that it was not there at noon and had been removed by some person other than C. *State v. Scott*.. 296
2. **SAME—EVIDENCE—SUFFICIENCY.** Where the theft of money belonging to C., who had left the state, is established by the testimony of other witnesses that C. and detectives had opened and searched the trunk in which the money had been placed, and failed to find it, proof that C. had made "complaint" or accused any particular person is not essential. *State v. Scott*..... 296
3. **SAME—EVIDENCE—SUFFICIENCY—CONFESSIONS—CORPUS DELICTI.** Upon a prosecution for the theft of \$480 that was kept in a trunk, the fact that, when the defendant was arrested on the same day in another city, he had \$67.50 and some articles that had been in the trunk that morning, and that defendant told the officer that he took only \$50, but did not get it from the trunk, but from a dresser, is admissible and sufficient to make a case for the jury; a defendant's confession, along with other evidence, being admissible to establish the *corpus delicti*. *State v. Scott*..... 296

LAW OF THE CASE:

See **APPEAL AND ERROR**, 27.

LEASES:

See **LANDLORD AND TENANT**.

LEVY:

Of attachment, see **SHERIFFS AND CONSTABLES**, 1, 3.

LIBEL AND SLANDER:

Publication of writing discharging employee, see **MASTER AND SERVANT**, 1-4.

1. **LIBEL AND SLANDER—MATTER LIBELOUS PER SE—PLEADING—SPECIAL DAMAGES.** The publication of a writing discharging an employee "for intimidating company's employees" is libelous *per se*, as tending to deprive him of public confidence, and to injure him in his social and business intercourse and in the pursuit of his business or occupation, within Rem. & Bal. Code, §2424, defining criminal libel; hence it is unnecessary to allege special damages. *Dick v. Northern Pac. R. Co.*..... 211
2. **LIBEL AND SLANDER—ACTIONS—LIMITATIONS.** Since each publication constitutes a separate offense, a complaint charging the continued publication of a libel up to the time of the commencement of the action is invulnerable to a demurrer raising the bar of the statute of limitations. *Dick v. Northern Pac. R. Co.*..... 211
3. **LIBEL AND SLANDER—SPECIAL DAMAGES—PLEADING.** In an action by a discharged servant for libel, there can be no recovery for loss of employment, failure to secure employment, or other specific loss by reason of the publication, unless alleged as special damages. *Dick v. Northern Pac. R. Co.*..... 211

LIBERTY:

Act regulating commission merchants as interference with, see **FACTORS**, 1.

LICENSES:

Commission merchants' license, see **FACTORS**.

LIENS:

See **MECHANICS' LIENS**.

Mortgage, see **CHATTEL MORTGAGES**, 3.

Protection of garnishee's lien, see **GARNISHMENT**, 1.

Of creditors, necessity of to attack conditional sale contract, see **SALES**, 4.

LIFE INSURANCE:

See **INSURANCE**.

LIMITATION OF ACTIONS:

Suits on claims against estate of incompetent person, see **INSANE PERSONS**, 2.

Equitable relief against judgment, see **JUDGMENT**, 7.

For publication of libel, see **LIBEL AND SLANDER**, 2.

Cancellation of tax deed for fraud, see **TAXATION**, 4.

LIMITATION OF ACTIONS—CONTINUED.

1. **LIMITATION OF ACTIONS—LOCAL IMPROVEMENT—WARRANTS—NOTICE OF FUND.** An action upon a final warrant drawn on a special improvement fund is not barred by the statute of limitations, where the plaintiff had no knowledge of the condition of the city fund within three years prior to the commencement of the action. *University State Bank v. Bremerton*..... 261
2. **LIMITATION OF ACTIONS—FRAUD—DISCOVERY — DILIGENCE — QUESTION FOR JURY.** In an action for relief upon the ground of fraud, to be commenced, under Rem. & Bal. Code, § 159, subd. 4, within three years after discovery by the aggrieved party of the facts constituting the fraud, whether plaintiff discovered, or by the use of reasonable diligence could have discovered, the fraud so as to bar the action, is a question for the jury, where it appears that in 1908 plaintiff paid defendant \$15,000 to invest in mining stock upon the same basis as defendants and others had paid, which was five cents a share, but defendant purchased stock for plaintiff at fifteen cents a share; that plaintiff became a director in the corporation and had access to the books showing the prices others had paid, and there was evidence that he knew what others had paid; but plaintiff testified that he had the utmost confidence in the defendant, his suspicions were not aroused, his attention was not called to the records, he had no actual possession of the books, and no notice of the fact that his stock had been purchased at a greater sum than others had paid until December 1, 1913, and the action was commenced in February, 1914. *McDonald v. McDougall*..... 339
3. **LIMITATION OF ACTIONS—RUNNING OF STATUTE—CONCEALMENT OF DEFENDANT.** The statute of limitations is not tolled by the "concealment" of the defendant in this state, within the meaning of Rem. & Bal. Code, § 168, tolling the statute of limitations as to actions that accrue against any person who shall be out of the state or "concealed" therein, where it appears that the defendant, the maker of a note, executed at C. in Alaska, lived at C. for two years after the note became due, and then went to other parts of Alaska where he did business in his own name, and came to this state three years after the note became due, where for eleven years he resided in an open manner known to his neighbors by his true name only. *Northern Commercial Co. v. Big Four Trading Co.*..... 589
4. **SAME—RUNNING OF STATUTE—REVIVAL — PART PAYMENT.** Where judgment upon a partnership note was entered against the partnership and one of the partners personally, his partial payment of the judgment is a payment on the judgment and not on the note, and does not revive the obligation against a partner not served in the action, after the statute of limitations had run upon the note, in the absence of express authority to make such a payment. *Northern Commercial Co. v. Big Four Trading Co.*..... 589

LIS PENDENS:

Pendency of other action ground for abatement, see **ABATEMENT AND REVIVAL**.

Necessity of on filing and recording copy of writ and notice of levy of attachment, see **VENDOR AND PURCHASER**, 2.

LOANS:

See **USURY**.

To wife as community debt, see **HUSBAND AND WIFE**, 3.

MANDAMUS:

Finality of orders in mandamus proceedings, see **APPEAL AND ERROR**, 3.

To compel correction or supplement to statement of facts, see **APPEAL AND ERROR**, 14.

1. **MANDAMUS—WHEN LIES—RIGHT.** Mandamus only issues against an officer in his official capacity to compel the performance of a duty imposed by law pertaining to his office; hence does not lie to compel the destruction of photographs rightfully taken of prisoners of a reformatory, in the absence of any statute therefor. *Hodgeman v. Olsen* 615

MANDATE:

To lower court on decision on appeal, see **APPEAL AND ERROR**, 36, 37.

MARK:

Distinguishing marks on ballots, see **ELECTIONS**.

MARRIED WOMEN:

See **HUSBAND AND WIFE**.

MASTER AND SERVANT:

Publication of writing discharging employee, see **LIBEL AND SLANDER**.
Liens for labor and materials, see **MECHANICS' LIENS**.

1. **MASTER AND SERVANT—DISCHARGE—DAMAGES — "BLACKLISTING"—COMPLAINT—SUFFICIENCY.** A complaint in an action by a discharged employee for damages through the publication and circulation of false and defamatory reasons for his discharge is insufficient to state a cause of action for blacklisting, where it fails to allege that the publication reached any person to whom plaintiff ever applied for employment or did in fact influence any one not to employ him; and the mere averment of a custom among railroads to require permission to refer to former employers of an applicant is insufficient to imply a conspiracy between railroad companies not to employ discharged employees. *Dick v. Northern Pac. R. Co.* 211
2. **SAME.** An allegation in such a complaint that the plaintiff since his discharge has been seeking but has been unable to secure em-

MASTER AND SERVANT—CONTINUED.

- ployment, that defendant is continuing to "blacklist" and "boycott" the plaintiff with all other railroad companies, and refused to furnish plaintiff with clearance papers, by reason whereof plaintiff has been compelled to abandon his chosen profession, is insufficient to state a cause of action, in the absence of any specific allegation of any conspiracy or acts constituting any agreement amounting to the blacklisting or boycotting of the plaintiff; such allegations being mere conclusions. *Dick v. Northern Pac. R. Co.*..... 211
3. SAME—DISCHARGE—DUTY TO GIVE CHARACTER. In the absence of statute, contract, or custom, there is no duty on the part of an employer to furnish a discharged servant with a certificate of character. *Dick v. Northern Pac. R. Co.*..... 211
4. SAME. The violation of the criminal statute against blacklisting, Rem. & Bal. Code, § 6565, gives rise to a civil action for damages. *Dick v. Northern Pac. R. Co.*..... 211
5. MASTER AND SERVANT—INJURIES TO SERVANT—VICE PRINCIPAL—ACTS OUTSIDE SCOPE OF EMPLOYMENT. A railway call boy, instructing a new call boy in the matter of his duties in calling a train crew in town about one mile distant up the track, acts outside the scope of his employment, and not as a vice principal, when he directed the new boy to jump on a train going to the town and to jump off while the train was in motion, where call boys were prohibited by rule from riding upon trains and the yard foreman had particularly cautioned the new boy against jumping on or off trains in going to town. *Vanordstrand v. Northern Pac. R. Co.*..... 665
6. SAME—FELLOW SERVANTS—FEDERAL EMPLOYERS' LIABILITY ACT—SCOPE OF EMPLOYMENT. The Federal employers' liability act making employers liable to their employees for the negligence of fellow servants, applies only to acts of the fellow servants done in the scope of their employment. *Vanordstrand v. Northern Pac. R. Co.*..... 665
7. SAME—FELLOW SERVANT—SUPERVISION OVER WORK. A fellow servant does not become a vice principal because, for the moment, he assumes to give directions as to the method of doing the work. *Vanordstrand v. Northern Pac. R. Co.*..... 665

MATERIALMEN:

Notice to owner of material furnished for building, see MECHANICS' LIENS.

MEASURE OF DAMAGES:

See DAMAGES.

For sale under junior writ, see SHERIFFS AND CONSTABLES, 2.

MECHANICS' LIENS:

1. **MECHANICS' LIENS—MATERIALS—NOTICE TO OWNER—SUFFICIENCY—STATUTES.** 3 Rem. & Bal. Code, § 1133, providing that materialmen shall serve notice upon the owner stating "in substance and effect . . . that a lien may be claimed" for materials furnished to the contractor, is sufficiently complied with by a notice of the furnishing of materials, reciting: "Complying with the lien laws of the state of Washington"; 2 Id., § 1147, requiring a liberal construction of the lien laws. *Ehrlich-Harrison Co. v. Cushman*..... 190

MINORS:

Judgment against, vacation for fraud, see **INFANTS**.

MISAPPROPRIATION:

Of state funds, right of taxpayer to bring suit against state, see **STATES**.

MISREPRESENTATION:

Inducing sale, see **SALES**, 2, 3.

By vendor in sale of land, see **VENDOR AND PURCHASER**, 1.

MODIFICATION:

Of judgment or order on appeal, see **APPEAL AND ERROR**, 38.

Of contract, see **CONTRACTS**, 5.

MONEY RECEIVED:

Recovery of price paid for goods, see **SALES**, 2, 3.

MOOT QUESTION:

See **APPEAL AND ERROR**, 6; **FRAUDULENT CONVEYANCES**, 7.

MORALITY:

Examination of witness as to immorality, see **WITNESSES**, 3.

MORTGAGES:

Personal property, see **CHATTEL MORTGAGES**.

Involuntary foreclosure sale as breach of condition against transfer of telephone franchise, see **TELEGRAPHS AND TELEPHONES**, 5.

1. **MORTGAGES—FORECLOSURE—ATTORNEY'S FEES—STATUTES.** Upon the foreclosure of a mortgage securing the payment of a principal sum and interest according to the terms and conditions of two certain promissory notes, which notes provided for a reasonable attorney's fee, the superior court is authorized to fix a reasonable sum for attorney's fees to be included in the judgment and made a lien upon the mortgaged property; in view of Rem. & Bal. Code, § 474, which provides that the compensation of attorneys shall be left to the agreement of the parties, with allowances to the prevailing party of certain sums for expenses as costs, and § 475, providing that,

MORTGAGES—CONTINUED.

In all cases of foreclosure of mortgages, the amount thereof shall be fixed by the court at such sum as the court deems reasonable, any stipulation in the note or mortgage to the contrary notwithstanding, but the fee in no case to be fixed above the contract price stated in the note and mortgage. *Matson v. Frank*..... 669

MOTIONS:

For judgment *non obstante*, see JUDGMENT, 2, 3.

Opening or vacating judgment, see JUDGMENT, 9.

New trial in civil actions, see NEW TRIAL, 2.

MUNICIPAL CORPORATIONS:

Condemnation by cities, see EMINENT DOMAIN, 2, 5, 6-8.

Injunctions affecting, see INJUNCTION.

Bar of action on local improvement warrant, see LIMITATION OF ACTIONS, 1.

Street railroads, see STREET RAILROADS.

Franchise for use of streets for telephone lines, see TELEGRAPHS AND TELEPHONES.

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—BONDS—CONDITIONS—"SUPPLIES." A bond given by a contractor to secure payment of materials furnished, and of all persons who shall supply the contractor with provisions and "supplies" for the carrying on of the work, in compliance with Rem. & Bal. Code, § 1159, does not cover a sum due for rubber goods, consisting of hose, washers, couplings, belts, tubing, gloves, boots, and overcoats which were entirely worn out in the construction of a steel bridge; since the goods were in the nature of "equipment" and neither "materials" nor "supplies" within the meaning of the act. *United States Rubber Co. v. American Bonding Co.*..... 180
2. SAME—STREETS—CHANGE OF GRADE—RIGHT TO DAMAGES. Where property has been improved with reference to a paper grade, the owner is entitled to compensation for any damages suffered by a subsequent actual change in the grade from the former paper grade. *Spokane v. Onstine*..... 4
3. SAME—IMPROVEMENTS—PROCEEDINGS TO ASSESS COMPENSATION—PARTIES. Only property owners whom the city believes damaged by street improvements are necessary parties to a condemnation suit by the city, property owners omitted having the right of intervention or of bringing an original action in their own behalf. *Spokane v. Onstine* 4
4. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS. Where a city proceeded with the improvement of a street, and at the same time established a change of grade therefor, levying an assessment for the benefits created by the improvement, it

MUNICIPAL CORPORATIONS—CONTINUED.

- might subsequently institute proceedings under the eminent domain law (Rem. & Bal. Code, § 7768 *et seq.*) for the purpose of assessing benefits for the change of grade, and cannot be charged with making a double assessment, since the two assessments are made for two separate benefits. *Spokane v. Onstine*..... 4
5. SAME—PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS. Under Rem. & Bal. Code, § 7820, providing that, if any city has damaged any property for any of the purposes mentioned in the eminent domain act without having made just compensation therefor, such city may cause such compensation to be ascertained by proceedings taken in accordance with the provisions of such act, the court would have jurisdiction to entertain such proceeding notwithstanding the fact that the change of grade and the improvement were ordered by the city at the same time, as virtually one improvement, but assessment had been levied only for the street improvement and not the change of grade. *Spokane v. Onstine*..... 4
6. SAME. Under Rem. & Bal. Code, § 7787, providing that, upon petition therefor, the court shall appoint the eminent domain commission of a city, if there be one, to assess the cost of an improvement and apportion the judgment for damages over the assessment district, and Id., § 7820, providing that, where the compensation for damaged property has not been ascertained prior to the time the improvement is made, the council may ascertain the amount of the compensation by proceedings taken in accordance with the provisions of the eminent domain act, the eminent domain commissioners of the city had power to assess benefits as well as ascertain the compensation due, since the whole statute implies that such assessments shall be laid according to relative benefits. *Spokane v. Onstine*. 4
7. SAME—ASSESSMENT OF BENEFITS—OFFSETTING DAMAGES. In a hearing upon the assessment roll prepared by the eminent domain commission, after condemnation proceedings, property owners are not entitled to offset their damages against the assessments, since the only question the court can try is whether there was an equitable and ratable assessment upon the property benefited, the question of damages being one to be assessed by a jury in a proper proceeding therefor. *Spokane v. Onstine*..... 4
8. SAME—ASSESSMENT OF BENEFITS—APPEAL. The action of city eminent domain commissioners in apportioning assessments according to benefits will not be disturbed on appeal, where it does not appear from the record to be so arbitrary or unjust as to amount to an abuse of discretion. *Spokane v. Onstine*..... 4
9. MUNICIPAL CORPORATIONS—POLICE POWERS—TAXICAB DRIVERS—SOLICITATION—ORDINANCES—CONSTRUCTION. An ordinance regulating the conduct of taxicab and other drivers forbidding them to be at

MUNICIPAL CORPORATIONS—CONTINUED.

- certain places or upon the property of transportation companies, "while engaged in such occupation and soliciting customers or passengers for hire," does not prohibit them from entering such places when they are not soliciting patronage; nor does it attempt to regulate transportation companies; and the same is a lawful regulation of such solicitations, as a protection of the public. *Seattle Taxicab & Transfer Co. v. Seattle*..... 594
10. SAME—POLICE POWERS—ORDINANCES—"SOLICITING." In an ordinance regulating solicitation by taxicab and other drivers, and confining the same to certain places, "soliciting" within the meaning of the ordinance is to ask for and seek to obtain the right to carry passengers or their baggage for hire by actual persuasion or persistent entreaty, and the mere presence of a driver, whether in uniform or not, and whether alone or accompanied by a vehicle, is not "soliciting." *Seattle Taxicab & Transfer Co. v. Seattle*.... 594
11. SAME—OFFICERS—ACTIONS—PERSONAL LIABILITY FOR COSTS. In an action against a city and its chief of police to enjoin the enforcement of certain ordinances, in which the chief was acting without personal interest and as the mere agent of the city, it is error, on giving judgment against the defendants, to enter judgment for costs against the chief personally. *Seattle Taxicab & Transfer Co. v. Seattle* 594
12. MUNICIPAL CORPORATIONS—CONTRACT FOR IMPROVEMENTS—VALIDITY—INDEPENDENT CONTRACTORS—TORTS—LIABILITY OF CITY. An understanding arrived at by correspondence between the water commissioner of a city of the third class and contractors, whereby they undertook to dig trenches in the streets for water mains, involving an expenditure of over \$500, is not a valid contract of the city whereby the contractors would be independent contractors, in view of Rem. & Bal. Code, § 7694, requiring street contracts requiring an expenditure of \$500 to be let to the lowest bidder; and in view of the city ordinances requiring certain provisions in such contracts, and the taking and approval of indemnity bonds securing performance of the same. *Davis v. Wenatchee*..... 13
13. SAME—TORTS—PUBLIC IMPROVEMENTS—INDEPENDENT CONTRACTORS—LIABILITY OF CITY—ESTOPPEL. Where a city permits street work to be done without any valid contract therefor and accepts the benefits thereof, it cannot claim that the persons doing the work are independent contractors instead of servants of the city, and therefore it cannot escape liability for the negligence of such parties, on the plea that it was acting *ultra vires*. *Davis v. Wenatchee*.... 13
14. SAME—PUBLIC IMPROVEMENTS—TORTS—LIABILITY—EXPLOSIVES—FAILURE TO SAFEGUARD. A city is liable for negligence in failing to

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- safeguard explosives, known by it to be used by its agents and employees in digging trenches in the streets, where dynamite caps and fuse were left in an untied sack upon the parking strip after work for the day was done, and a child found the same and was injured by the explosion of a cap. *Davis v. Wenatchee*..... 13
15. SAME—TORTS—NOTICE TO CITY. Where a city is doing work through its own employees, it is charged with notice of their negligent acts in using and failing to safeguard explosives used in the work. *Davis v. Wenatchee*..... 13
16. MUNICIPAL CORPORATIONS—TORTS—DAMAGES FROM FLUMES—NATURAL CONDITIONS. A city is not liable for damages to the pipe lines of a heating company caused by leakage from wooden flumes used by the city for irrigation of its parking system, where the damage was the result of natural conditions known to the heating company at the time it obtained its franchise to tunnel beneath the flumes. *Yakima Central Heating Co. v. North Yakima*..... 99
17. MUNICIPAL CORPORATIONS—STREETS—NEGLIGENT DRIVING—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action for injuries sustained by pedestrians struck by an automobile, in the nighttime, where plaintiffs stopped and looked in all directions before starting to cross a street in the middle of the block and saw no car approaching and were struck by a car carrying insufficient lights, which it was impossible to see any distance, and the plaintiffs did not see the car until about six feet away, it is proper to refuse an instruction that plaintiffs were guilty of contributory negligence in crossing the street in the middle of the block in case the view was unobstructed and the car carried ordinary lights; since the instruction was not based upon the evidence. *Tooker v. Perkins*..... 567
18. SAME. In such an action, evidence to the effect that, when plaintiff first saw the car, it veered to the east and he assumed it would pass to the east of him, when it suddenly veered to the west, does not warrant an instruction based on the fact that plaintiff assumed that the car would pass down an east driveway contrary to the law of the road, since there was no evidence of any such assumption on his part. *Tooker v. Perkins*..... 567
19. SAME—STREETS—NEGLIGENT USE—CONTRIBUTORY NEGLIGENCE—ACTS IN EMERGENCY—QUESTION FOR JURY. Where a rapidly approaching automobile, but a few feet distant, first veered to the east, and then suddenly veered to the west, striking the plaintiffs, head on, before they could move, the question of their contributory negligence in endeavoring to get out of the way in the emergency is for the jury. *Tooker v. Perkins*..... 567
20. SAME—STREETS—NEGLIGENT USE—FAILURE TO SOUND HORN—QUESTION FOR JURY. In an action for personal injuries in running down

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- pedestrians on a dark night, with an automobile going 25 miles an hour, having no headlights as required by ordinance, whether defendant was negligent in not sounding a horn in the middle of a dark block, is a question for the jury, the ordinance requiring the sounding of warning where danger exists to any person in or upon the street. *Tooker v. Perkins*..... 567
21. SAME—STREETS—NEGLIGENT USE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action for personal injuries sustained by pedestrians, struck by an automobile, an instruction that the plaintiffs were guilty of contributory negligence in crossing the street in the middle of the block, in case they could with reasonable diligence have discovered the approaching car with its side lights burning, is properly refused where it ignored evidence that the car was not sufficiently lighted and could not have been seen at that distance, and that plaintiffs looked but could not see the car until the car, approaching at twenty or twenty-five miles an hour, was within ten or fifteen feet from them; especially where other instructions stated the law as favorably to the appellants as it could be. *Tooker v. Perkins* 567
22. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—WARRANTS—DEFENSES—NONNEGOTIABILITY. Any defense available against contractors in public work to whom a nonnegotiable warrant was issued is available against their assignee. *University State Bank v. Bremerton* 261
23. SAME—LOCAL IMPROVEMENTS—WARRANTS—ACTIONS—DEFENSES—ESTOPPEL. The issuance of a final warrant to a contractor on public work which included the amount of a fixed estimate for the city's expenses for which the city should have issued a separate warrant to be indorsed by the contractor and returned to the city, does not estop the city from interposing the defense of a credit therefor, in an action on the warrant issued. *University State Bank v. Bremerton* 261
24. SAME—LOCAL IMPROVEMENTS—WARRANTS—PAYMENT—EVIDENCE—SUFFICIENCY. The evidence establishes that a certain city warrant issued to a contractor on public work was not intended to apply as a payment on the last warrant issued but was intended to apply on prior warrants, where the amount exactly equalled the total of a sum due on one of the prior warrants plus a sum indorsed on another prior warrant, of which there was no evidence that the holder, a bank, had received the money, and no evidence that the city had paid it. *University State Bank v. Bremerton*..... 261
25. SAME—LOCAL IMPROVEMENTS—WARRANTS—ACTIONS—DEFENSES—CREDITS—ESTOPPEL. Where it is impracticable until after final settlement to determine or withhold the amount of cash discounts due

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- from a contractor to a city by reason of cash payments of property owners, the city is not estopped from claiming a credit therefor by reason of its nonretention of a thirty per cent protection fund for which the contract provided. *University State Bank v. Bremerton* 261
26. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—WARRANTS—INTEREST. In an action upon a special fund warrant expressly providing that it is noninterest bearing, interest should not be allowed on the warrant. *University State Bank v. Bremerton*..... 261
27. SAME—CLAIMS—FILING—STATUTES—VALIDITY. The provision of a city charter requiring all claims for damages against the city to be filed with the clerk within thirty days after the time when such claims accrue, is not inoperative because of the hardship it would work if given effect. *Lindblom v. Seattle*..... 305
28. MUNICIPAL CORPORATIONS—CLAIMS—REQUISITES—RESIDENCE OF CLAIMANT—STATUTES. Rem. & Bal. Code, § 7995, providing that every claim for damages sounding in tort against a city of the first class, filed in compliance with valid charter provisions of the city, shall contain a statement of the actual residence of the claimants at the date of presenting and filing such claim and for six months immediately prior to the time the claim accrued, is substantially complied with—and that is all that is required—by a notice stating the claimant's residence at the date of the verification and for at least six months prior thereto, when both verified and filed within thirty days after the claim accrued; the presumption being that the residence remained the same until the day of filing, and all the purposes of the statute being thereby fulfilled. *Maggs v. Seattle* 427
29. MUNICIPAL CORPORATIONS—ACTIONS—CLAIMS—PRESENTATION. Under Rem. & Bal. Code, § 7998, requiring all claims for damages against a city of the third class to be filed within thirty days from the time when the claim accrued, all such claims to accurately locate and describe the defect that caused the injury, etc., and that no action shall be maintained for any claim for damages until the same is presented and sixty days have elapsed, it is necessary to file a claim either in actions *ex delicto* or *ex contractu* before the action can be maintained. *Lenhart v. Hoquiam*..... 168
30. MUNICIPAL CORPORATIONS—CLAIMS—PRESENTATION—PLEADING. A complaint for damages against a city showing that the claim therefor was not presented within the thirty days prescribed by the city charter, is demurrable. *Lindblom v. Seattle*..... 305
31. SAME—CLAIMS—FILING—WAIVER. The fact that a city council considered and rejected a claim that was not filed within the time al-

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lowed by the city charter does not show a waiver of the provision relative to the presentation of claims. *Lindblom v. Seattle*.... 305

32. SAME—ACTIONS — PLEADING — CONDITIONS PRECEDENT — DEMURRER. Where the presentation of a claim against a city is a condition precedent to action, failure to file the claim is not a subject of defense, but must be alleged and may be taken advantage of by demurrer. *Lenhart v. Hoquiam*..... 168
33. SAME—ACTIONS—COMPLAINT—CONSTRUCTION. An allegation that a city is a municipal corporation and was a city of the third class at the time plaintiff's first cause of action accrued and subsequent thereto, is an allegation that it is a city of the third class. *Lenhart v. Hoquiam*..... 168

NAVIGABLE WATERS:

Title to beds and shores of navigable streams, see PUBLIC LANDS.

1. NAVIGABLE WATERS—LANDS UNDER WATER—RIGHTS OF OWNER—STATUTE. Under 3 Rem. & Bal. Code, § 8173-1, providing that the water boundary of second-class shore lands on navigable waters, purchased from the state, when not defined in grants theretofore made, shall be the line of ordinary navigation, and upon the lowering of such waters by state or Federal action such water boundary shall thereafter be held to be the line of ordinary navigation as the same shall be found in such waters after such lowering, and granting and confirming all such lands to such purchasers, a grant of shore lands is made in contemplation of a change in physical conditions and that a new line of navigability will be assimilated on the lowering of the waters; but, until that change occurs, the established harbor line is the limit of the fixed title of the shore owners; hence the relative rights of shore owners and occupants of lands in front of the present line of navigability is determined by the granting act *supra*. *State v. Sturtevant*..... 1
2. NAVIGABLE WATERS — IMPROVEMENTS — WHO MAY COMPLAIN. Improvements outside the inner harbor line are presumptively in navigable waters, but, where the state is the only party having a present interest therein, a private abutting owner of the shore lands cannot complain. *State v. Sturtevant*..... 1
3. NAVIGABLE WATERS—RIPARIAN RIGHTS—TITLE TO BEDS—ABANDONMENT OF STREAM. Riparian owners upon a navigable stream acquire no title to portions of the beds and shores abandoned by the state in improving and straightening the stream, under 3 Rem. & Bal. Code, § 8173a, granting to the commercial waterway district the title to the beds and shores that cease to be a part of the stream; since the state's title is paramount, and riparian rights are subject to the rights of navigation, and extend only to the use and accustomed

NAVIGABLE WATERS—CONTINUED.

flow of water, unless new lands result from accretion, reliction, or avulsion. *Hill v. Newell*..... 227

NECESSITY:

Of pleading special matters in defense, see **PLEADING**, 5.
Of acquiring specific lien by subsequent creditor, see **SALES**, 4.
For findings, see **TRIAL**, 6.

NEGLIGENCE:

Instructions as to negligence in carriage of passenger, see **CARRIERS**, 1.
In ejection of intoxicated passenger, see **CARRIERS**, 2, 3.
Measure of damages, see **DAMAGES**.
Of contractors on public work, see **MUNICIPAL CORPORATIONS**, 13.
Cause of personal injuries in city street, see **MUNICIPAL CORPORATIONS**, 13-21.
Of person injured on street, see **MUNICIPAL CORPORATIONS**, 17-19, 21.
Sale of impure food, failure of proof, see **PLEADING**, 10.
In operation of street car, see **STREET RAILROADS**.

1. **NEGLIGENCE—APPLIANCES DANGEROUS TO CHILDREN—EVIDENCE—SUFFICIENCY.** An ordinary two wheeled scraper, with a tongue similar to a wagon tongue, somewhat cumbersome and difficult to control, is an appliance dangerous to children, and it is negligence for a contractor to leave the same upon school grounds of a minor grade school while school was regularly held, unfastened and unguarded so that it could be hauled around by children of tender years. *Jorgenson v. Crane*..... 273
2. **NEGLIGENCE—CARE AS TO CHILDREN—EXPLOSIVES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.** The contributory negligence of a boy, eleven years of age, in holding a lighted fuse in a dynamite cap, is a question for the jury, where he testified that he did not know what the cap was, and used it to hold the fuse to avoid burning himself and he thought the lighted fuse would only "fizz." *Davis v. Wenatchee* 13

NEGOTIABLE INSTRUMENTS:

See **BILLS AND NOTES**.
Gifts of, see **GIFTS**, 2.

NEW TRIAL:

- Review of discretion in ruling on motion for, see **APPEAL AND ERROR**, 24-26.
1. **NEW TRIAL—MISCONDUCT OF JURY—IMPEACHMENT OF VERDICT.** It is proper to deny a new trial for misconduct of the jury in the jury room, shown by affidavits of two of the jurors who did not agree

NEW TRIAL—CONTINUED.

to the verdict, in that certain jurors gave improper reasons for their verdict, and that one of them was sick and agreed to the verdict for that reason, and that one had signaled to a woman in another office, where, so far as not contradicted, they were statements of facts which inhere in the verdict and could not be considered. *Lindquist v. Pacific Coast Coal Co.*..... 408

2. **NEW TRIAL—MOTIONS—RECORD.** The purported denial of a motion for a new trial, before the motion was made or the findings entered or signed, does not preclude a motion for a new trial within the statutory time which did not commence until the findings were filed. *Clark v. Ellington*..... 110

NOTES:

Promissory notes, see **BILLS AND NOTES**.

NOTICE:

To quit premises as condition precedent to action for unlawful detainer, see **LANDLORD AND TENANT**.

As affecting bar of statute, see **LIMITATION OF ACTIONS**, 1.

To owner of furnishing of materials, see **MECHANICS' LIENS**.

To city of negligence of employees, see **MUNICIPAL CORPORATIONS**, 15.

Claim for damages, see **MUNICIPAL CORPORATIONS**, 27-32.

Appointment of receiver, see **RECEIVERS**, 1, 2.

Purchaser of real property, see **VENDOR AND PURCHASER**, 2.

OBJECTIONS:

To pleadings, see **PLEADING**, 1.

OFFICERS:

Corporate officers, see **CORPORATIONS**, 3, 4.

Injunctions affecting, see **INJUNCTION**, 1.

Mandamus affecting, see **MANDAMUS**.

Personal liability for costs, see **MUNICIPAL CORPORATIONS**, 11.

Prohibition to enjoin acts of state officials, see **PROHIBITION**, 5.

Of state reformatory, powers of, see **REFORMATORIES**.

Action against state officers, right to sue, see **STATES**.

OPTION:

To purchase, see **SALES**, 1.

ORDERS:

Review of, see **APPEAL AND ERROR**, 3, 4.

Action to recover on accepted order, see **BILLS AND NOTES**, 1.

ORDINANCES:

Municipal ordinances, see **MUNICIPAL CORPORATIONS**, 9-11.

OWNERSHIP:

Of money delivered in mails for consignee, see **PAYMENT**.
Of property sought to be replevined, see **REPLEVIN**.

PAROL EVIDENCE:

To explain written order, see **BILLS AND NOTES**, 1.
To overcome presumption of personal liability of officer in guaranteeing payment of drafts, see **CORPORATIONS**, 3.
Application of equitable maxim as varying written contract, see **EQUITY**.
In civil actions, see **EVIDENCE**, 5-7.

PARTIES:

Entitled to review, see **APPEAL AND ERROR**, 15.
Entitled to allege error, see **APPEAL AND ERROR**, 16.
Entitled to sue on bond of subcontractor on state work, see **BONDS**.
Entitled to question validity of mortgage, see **CHATTEL MORTGAGES**, 2, 3.
Absence of as ground for continuance, see **CONTINUANCE**.
Intent of as to law governing contract, see **CONTRACTS**, 3, 4.
Rights and liabilities as to costs, see **COSTS**.
Liable for incest, see **INCEST**.
Persons concluded by judgment, see **JUDGMENT**, 9.
To condemnation suit by city, see **MUNICIPAL CORPORATIONS**, 3.
Liability of officer as to costs, see **MUNICIPAL CORPORATIONS**, 11.
Persons entitled to relief by prohibition, see **PROHIBITION**.

1. **PARTIES—REAL PARTIES IN INTEREST.** In such case, the plaintiff, being fully compensated by complete repairs of the machine and not liable for the bill, could not maintain an action in her own right as the real party in interest. *Broderick v. Puget Sound Traction, Light & Power Co.*..... 399
2. **PARTIES—TRUSTEE OF EXPRESS TRUST—IMPLICATION OF LAW.** Where repairs to plaintiff's automobile were made at the instance of a casualty company, which had insured the machine but failed to pay the repair bill, the owner, after receiving the machine fully repaired, is not entitled to maintain an action for the amount of the repairs against the party causing the damage, as trustee of an express trust under Rem. & Bal. Code, § 180, defining a trustee of an express trust as a person with whom or in whose name a contract is made for the benefit of another; since the trust, on obtaining judgment, is one arising by implication of law. *Broderick v. Puget Sound Traction, Light & Power Co.*..... 399

PARTNERSHIP:

Complaint in action for injury to firm business, joinder of causes of action, see **ACTION**.

PARTNERSHIP—CONTINUED.

1. **PARTNERSHIP—CONTRACTS—AUTHORITY TO MAKE—RATIFICATION.**
Ratification of a contract made by one partner for financing railroad construction work to be prosecuted by the firm is sufficiently established where it appears that the other partner knowingly participated in the use of the funds secured by the agreement, which he never questioned until the completion of the construction contract. *McDougall v. McDonald*..... 334
2. **PARTNERSHIP—ACTIONS BY PARTNERS—TORTS—INJURY TO BUSINESS—COMPLAINT—SUFFICIENCY.** A complaint on behalf of a partnership conducting a bakery business, alleging an assault upon the two members of the firm, in their place of business, in the nature of a public brawl, resulting in injury to the partnership business through the loss of reputation and the entire patronage of the business, states a cause of action entitling the partnership to relief, rather than a right of action personal to each member assaulted. *Seidell v. Taylor* 645
3. **PARTNERSHIP—ACTIONS BY PARTNERS—TORTS—LOSS OF GOOD WILL—EVIDENCE OF VALUE.** In an action for the loss of the good will of a partnership business through an assault upon the members of the firm amounting to a public brawl upon the premises and resulting in entire loss of patronage, the value of the good will is sufficiently established by evidence showing, in considerable detail, the manner of carrying on the business, and its receipts, expenses, and profits for some time prior to the assault; especially as damages from a wilful, malicious tort need not be measured with any degree of nicety. *Seidell v. Taylor*..... 645

PART PAYMENT:

As accord and satisfaction, see ACCORD AND SATISFACTION.

Within statute of limitations, see LIMITATION OF ACTIONS, 4.

PASSENGERS:

Carriage of, see CARRIERS.

PATENTS:

To purchaser of public lands, see TAXATION, 1.

PAYMENT:

See ACCORD AND SATISFACTION.

As effecting cessation of appeal, see APPEAL AND ERROR, 5.

Right of city to accounting of earnings and profits of condemned water company prior to payment of award, see EMINENT DOMAIN, 6.

Of debts of estate, see EXECUTORS AND ADMINISTRATORS, 1.

Protection of lien of attorney as garnishee defendant, see GARNISHMENT, 1.

PAYMENT—CONTINUED.

By garnishee, see **GARNISHMENT**, 2.

Part payment within statute of limitations, see **LIMITATION OF ACTIONS**, 4.

Of city warrant, see **MUNICIPAL CORPORATIONS**, 24.

1. **PAYMENT—PRESUMPTION—REMITTANCE BY MAIL—OWNERSHIP.**
Where a bank, upon request, delivered money in the mails by registered letter, addressed to the consignee, in the absence of any agreement or custom to that effect, there is no presumption that the carrier is the consignee's agent, but the presumption is that the money belongs to the sender until actually delivered to the consignee; the transaction being more in the nature of a payment than a consignment of goods and the creditor having the right to payment in person. *Masterson v. Union Bank & Trust Co.*..... 560

PERFORMANCE:

Of settlement contract, see **ACCORD AND SATISFACTION**, 1.

Of contract, see **CONTRACTS**, 7.

PERSONAL INJURIES:

See **NEGLIGENCE**.

To passenger, see **CARRIERS**.

Damages for, see **DAMAGES**.

From electric shock, see **ELECTRICITY**.

To employee, see **MASTER AND SERVANT**, 5, 7.

To person on city street, see **MUNICIPAL CORPORATIONS**, 13-15, 17-21.

To person on or near street railroad track, see **STREET RAILROADS**.

PETITION:

In condemnation proceedings, see **EMINENT DOMAIN**, 5.

PHOTOGRAPHS:

Right of privacy of convict with reference to publication of photograph, see **CONSTITUTIONAL LAW**, 1.

Right to compel destruction of photographs taken of convict, see **INJUNCTION**, 2.

Mandamus to compel destruction of pictures taken of convict, see **MANDAMUS**.

As evidence in prosecution for rape, see **RAPE**, 1.

Of prisoners, right to take, see **REFORMATORIES**.

PLEADING:

In action for accounting, see **ACCOUNT**.

Joinder of causes of action, see **ACTION**.

Dismissal for failure to amend, see **DISMISSAL AND NONSUIT**.

For alienation of affections, see **HUSBAND AND WIFE**, 8.

In action for libel, see **LIBEL AND SLANDER**.

PLEADING—CONTINUED.

In action for damages through publication of false reasons for discharge of employee, see MASTER AND SERVANT, 1, 2.

Alleging failure to file claim against city for damages, see MUNICIPAL CORPORATIONS, 30, 32.

In action against city, see MUNICIPAL CORPORATIONS, 30, 32, 33.

In action for injury to partnership business, see PARTNERSHIP, 2.

Waiver of defects by stipulation, see STIPULATIONS.

1. PLEADING—INDEFINITENESS. Objection to want of definiteness in a pleading must be taken by motion and not by demurrer. *Dick v. Northern Pac. R. Co.*..... 211
2. PLEADING—ANSWER—ADMISSIONS. An answer to a specified paragraph of a complaint, admitting that a claim against a guardian was presented and rejected, and denying that any sum was due, is a sufficient admission of the presentation and rejection of the particular claim alleged in such paragraph. *Clough v. Monro*..... 507
3. PLEADING—ADMISSIONS—FAILURE TO DENY. A general allegation that defendant was the duly appointed, qualified and acting guardian of an insane person, not moved against or denied, sufficiently establishes the guardianship. *Clough v. Monro*..... 507
4. PLEADING—ANSWER—AFFIRMATIVE DEFENSE. It is not error to sustain a demurrer to an affirmative defense when all the issues presented by the affirmative answer were sufficiently presented by the denials in the answer proper. *National Surety Company v. Fry Company* 118
5. PLEADING—MATTERS IN EVIDENCE—AFFIRMATIVE ANSWER—NECESSITY. In an action for breach of defendant's contract to furnish the money for a joint venture in purchasing and reselling certain property, the defendant, upon admitting the contract and denying its breach, is not entitled to show, as excuses for nonpayment, that the payment was not to be made until delivery of the property at Seattle, that such delivery could not be made within the time allowed by reason of failure of transportation, and that the title to the property was defective by reason of liens against it; since they were special matters in defense, to be affirmatively pleaded. *Lord v. Miller* 436
6. PLEADING—COUNTERCLAIM—SUFFICIENCY. In an action to recover on contract for obtaining persons to log plaintiff's land, a counterclaim for damages by reason of the negligence of the loggers, states no defense or claim against the defendant. *Jaklewicz v. Lenhart* 138
7. PLEADING—AMENDMENTS—VARIANCE—DISCRETION. In an action for an accounting and to recover profits under an agreement to obtain and prosecute certain railroad construction work, in which the complaint pleaded the profits obtained from only one contract for

PLEADING—CONTINUED.

such work, it is discretionary to allow the complaint to be amended to include the profits under another contract secured and completed under the original agreement of the parties, where no surprise was claimed by defendant and no continuance asked. *McDougall v. McDonald* 334

8. **PLEADINGS—VARIANCE—MATERIALITY—SHOWING.** A variance in the admission of evidence tending to somewhat broaden the scope of the issues is nonprejudicial, where no continuance was demanded and no showing made that the party was misled to his prejudice, in view of Rem. & Bal. Code, § 299, providing that no variance shall be material unless it actually misleads the party to his prejudice, and providing that the fact shall be shown to the satisfaction of the court, and for amendments to the pleadings on such terms as may be just. *Lee Hong v. Schoenwald*..... 326

9. **PLEADINGS—VARIANCE—FAILURE OF PROOF—ISSUES, TRIAL AND JUDGMENT.** In an action to recover money paid to an attorney through deceit and a conspiracy, submitted on the evidence taken in a similar case, it is error, upon finding that there was no deceit or fraud and that the issue presented by the complaint had not been proved, to give judgment for the plaintiff upon the theory of an excessive charge for services, paid by plaintiff when unduly prevailed upon; since an amendment without consent of either party, on failure of proof, is error, in view of Rem. & Bal. Code, § 301, providing that it shall not be deemed a variance, but a failure of proof, if the cause of action or defense is not proved in some particulars only, but in its entire scope and meaning. *McLachlan v. Gordon*..... 282

10. **PLEADINGS—ISSUES, PROOF AND VARIANCE—FAILURE OF PROOF—FOOD—SALES OF IMPURE FOOD.** In an action for damages through the alleged negligent sale of impure food, a verdict for the plaintiff cannot, in the absence of any evidence of negligence, be sustained upon the theory of liability under the pure food law, where there was no issue in the pleadings founded upon that act. *Wiser v. Northwestern Improvement Co.* 433

PLEDGES:

Pledge of corporate stock, see **CORPORATIONS**, 1; **USURY**.

POLICE POWER:

Act regulating commission as exercise of police power, see **FACTORS**, 1.

Of municipality, see **MUNICIPAL CORPORATIONS**, 9-11.

POLICY:

Of insurance, see **INSURANCE**.

POSSESSION:

Of property condemned, see EMINENT DOMAIN, 6, 8.

POWERS:

Of visiting judge, see JUDGES.

Of court to grant judgment *non obstante*, see JUDGMENT, 4, 5.

Of officers of state reformatory, see REFORMATORIES.

Of taxpayer to bring suit against state, see STATES.

Of city to grant franchise to telephone company for use of streets,
see TELEGRAPHS AND TELEPHONES, 1, 2.

PRACTICE:

See APPEAL AND ERROR; CRIMINAL LAW; DAMAGES; DIVORCE; EVIDENCE; INJUNCTION; JUDGMENT; NEW TRIAL; PLEADING; PROHIBITION; TRIAL.

PREFERENCES:

Of creditors by failing debtor, see FRAUDULENT CONVEYANCES, 4, 7, 8.

PREJUDICE:

Ground for reversal in civil actions, see APPEAL AND ERROR, 28-35.

From instructions, see TRIAL, 4.

PREMIUMS:

For insurance, see INSURANCE, 4.

PRESCRIPTION:

Title to waters by adverse use, see WATERS AND WATER COURSES.

PRESENTMENT:

Of claims for damages against city, see MUNICIPAL CORPORATIONS, 27-32.

PRESUMPTIONS:

On appeal, see APPEAL AND ERROR, 22.

Intent of parties as to law governing contract, see CONTRACTS, 3.

As to ownership of money delivered in mails, see PAYMENT.

As to legality of contract, see USURY.

PRINCIPAL AND AGENT:

See BROKERS; FACTORS.

Admissions of agent against interest, see CONTRACTS, 8.

Existence of relation between corporations, see CORPORATIONS, 5.

1. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—IMPLIED AUTHORITY—EVIDENCE—SUFFICIENCY. The evidence warrants a finding that an agent and bookkeeper of a firm of railroad contractors had implied authority to sell scrap iron, where it appears that he had repeatedly

PRINCIPAL AND AGENT—CONTINUED.

sold scrap iron from his employer's yards to the same purchaser, who on one occasion had been authorized to negotiate with the agent therefor; and it is immaterial that the agent absconded without accounting for the proceeds. *Caughren v. Kahan*..... 356

2. **PRINCIPAL AND AGENT—AUTHORITY OF AGENT—EVIDENCE—CUSTOM.** Upon an issue as to the authority of an agent and bookkeeper for railroad contractors to sell scrap iron, it is not admissible to prove a custom or usage in that city for railroad contractors generally to have a man in charge of the office authorized to sell and dispose of such material; in view of the fact that the contractors were not merchants or engaged in trade. *Caughren v. Kahan*..... 356
3. **PRINCIPAL AND AGENT—AUTHORITY OF AGENT—IMPLIED AUTHORITY—INSTRUCTIONS.** Instructions, considered as a whole, held to properly state the rules relating to the apparent or implied authority of an agent of railroad contractors to sell scrap iron to one who had previously made purchases from such agent. *Caughren v. Kahan* 356
4. **PRINCIPAL AND AGENT—PROOF OF AGENCY—STATEMENTS OF AGENT.** Neither the fact of agency nor the extent of the agent's authority can be proved by admissions or declarations of the agent to third persons in the absence of the principal. *Clough v. Monro*..... 507

PRINCIPAL AND SURETY:

See **GUARANTY; INDEMNITY.**

Liabilities of sureties on bonds in legal proceedings, see **APPEAL AND ERROR, 38.**

Parties entitled to sue on bond of subcontractor on state work, see **BONDS.**

Receiver's bond executed by husband as surety, as community debt, see **HUSBAND AND WIFE, 7.**

Sureties on receiver's bond, see **RECEIVERS, 3, 4.**

PRISONERS:

Mandamus to compel destruction of pictures taken of prisoners, see **MANDAMUS.**

Identification of by photographs and physical measurements, see **REFORMATORIES.**

PRISONS:

See **REFORMATORIES.**

PROCESS:

To confer jurisdiction in ejectment, see **EJECTMENT.**

Service upon guardian, see **INSANE PERSONS, 1.**

PROFITS:

Of joint venture, action to recover, see **JOINT ADVENTURES.**

PROHIBITION:

Jurisdiction of supreme court to issue writ, see **COURTS**.

Pending appeal in condemnation proceedings, see **EMINENT DOMAIN**, 8.

1. **PROHIBITION—TO COURTS—GROUNDS—JURISDICTION.** Prohibition does not lie to prevent the superior court from entering judgment where it has jurisdiction of the subject-matter of the action and there is an adequate remedy by appeal or writ of error; but only where the court is proceeding or threatening to proceed without or in excess of jurisdiction. *State ex rel. Prentice v. Superior Court* 90
2. **PROHIBITION—TO COURTS—GROUNDS—ERRONEOUS EXERCISE OF JURISDICTION.** Whether sufficient equitable grounds are stated in a cross-complaint for equitable relief against a judgment, or are shown by the evidence, are questions, in the first instance, within the jurisdiction of the trial court, reviewable only by appeal; hence prohibition does not lie to prevent such action as being beyond the jurisdiction of the court. *State ex rel. Prentice v. Superior Court*.... 90
3. **PROHIBITION—TO COURTS—WHEN LIES—JURISDICTION.** Since prohibition does not lie to arrest the erroneous exercise of acknowledged jurisdiction, the remedy being by appeal, it will not issue to a judge who has been given jurisdiction to enter a judgment to restrain him from erroneously determining an issue which it was not intended to submit to him. *State ex rel. Calhoun v. Superior Court*..... 492
4. **PROHIBITION—TO COURTS—JURISDICTION—REMEDY BY APPEAL.** An order of the superior court in probate, upon due application and notice, admitting a will to probate, is a final order determining the alleged jurisdictional residence of the deceased in that county, from which an appeal could have been taken; hence prohibition does not lie to prevent the court from proceeding in the matter on the ground that the court was without jurisdiction because the deceased resided at the time of his death in another county. *State ex rel. Neal v. Kauffman*..... 172
5. **PROHIBITION—TO COURTS—INADEQUACY OF REMEDY BY APPEAL.** Prohibition lies to prevent further proceedings in an action, brought by a taxpayer, as such, to enjoin state officials from misappropriating state funds, in payment for state highway work, although an appeal lies from the final judgment entered, where, on account of special and peculiar circumstances, the remedy in the ordinary course of law is inadequate. *State ex rel. Pierce County v. Superior Court* 685

PROMISSORY NOTES:

See **BILLS AND NOTES**.

PROOF:

Failure of proof, see **PEADING**, 9, 10.

Of agency, see **PRINCIPAL AND AGENT**, 4.

PROPERTY:

- Rescission for defect in title, see **CONTRACTS**, 6.
- Division of on divorce, see **DIVORCE**.
- Taking or damaging for public use, see **EMINENT DOMAIN**.
- Sales under execution, see **EXECUTION**.
- Subject to administration, see **EXECUTORS AND ADMINISTRATORS**, 1.
- Separate or community nature of, see **HUSBAND AND WIFE**, 1-4, 7.
- Recovery of possession, see **REPLEVIN**.

PROVINCE OF COURT AND JURY:

- In civil actions, see **TRIAL**, 2.

PROXIMATE CAUSE:

- Of injury from collision with street car, see **STREET RAILROADS**, 2.

PUBLICATION:

- Of false reasons for discharge of employee, see **LIBEL AND SLANDER**;
MASTER AND SERVANT, 1-4.

PUBLIC IMPROVEMENTS:

- By municipalities, see **MUNICIPAL CORPORATIONS**, 1-8, 12-15, 22-26.

PUBLIC LANDS:

- Homestead as separate property of spouse, see **HUSBAND AND WIFE**, 1.
- Taxation, see **TAXATION**, 1.
- 1. **PUBLIC LANDS—LANDS UNDER WATERS—GRANTS—BEDS AND SHORES—TITLE**. Under the Federal grant to the state, and the assertion of title by Const., art. 17, § 1, to the beds and shores of navigable streams, the title of the state is paramount and absolute, and not restricted to the power of regulation for the purposes of navigation. *Hill v. Newell*..... 227

PUBLIC POLICY:

- Conditions in telephone franchise as in violation of, see **TELEGRAPHS AND TELEPHONES**, 4.

PUBLIC USE:

- Taking property for public use, see **EMINENT DOMAIN**.

PUNISHMENT:

- See **CRIMINAL LAW**, 4, 5.

QUESTION FOR JURY:

- Care in removal of intoxicated passenger, see **CARRIERS**, 3.
- Discovery of fraud as barring right of action, see **LIMITATION OF ACTIONS**, 2.

QUESTION FOR JURY—CONTINUED.

Contributory negligence of persons struck by automobile, see **MUNICIPAL CORPORATIONS**, 19.

Negligence of driver in failing to sound horn, see **MUNICIPAL CORPORATIONS**, 20.

Negligence of minor, see **NEGLIGENCE**, 2.

RAILROADS:

As employers, see **MASTER AND SERVANT**.

In city streets, see **STREET RAILROADS**.

RAPE:

1. **RAPE—EVIDENCE—PHOTOGRAPHS—ADMISSIBILITY.** In a prosecution for statutory rape, in which it appeared that the accused had repeatedly taken the prosecutrix with him on automobile trips, and taken photographs of her and himself in secluded places, the photographs are admissible as evidence of opportunity to commit the offense. *State v. Hess*..... 240
2. **RAPE—EVIDENCE—CORROBORATING EVIDENCE—SUFFICIENCY.** In a prosecution for statutory rape, evidence that accused admitted that he was guilty, after having been accused of the offense by the prosecutrix in the presence of others, is sufficient as corroborating evidence, within the requirement of Rem. & Bal. Code, § 2443. *State v. Hess* 240
3. **RAPE—INSTRUCTIONS—CORROBORATING EVIDENCE.** In a prosecution for statutory rape, under Rem. & Bal. Code, § 2443, requiring corroboration of the testimony of the female, it is not error to instruct that the slightest corroboration may be sufficient if it tends to connect defendant with the commission of the offense. *State v. Hess* 240
4. **SAME.** In a prosecution for statutory rape, under Rem. & Bal. Code, § 2443, requiring corroboration of the testimony of the female, it is not error to give an instruction allowing the jury to consider all the evidence, including that of the female, as well as the corroborating testimony, if there is any; since it is only by comparison that its corroborative effect can be determined. *State v. Hess*... 240

RATIFICATION:

Of acts of partner, see **PARTNERSHIP**, 1.

Of receiver's bond, see **RECEIVERS**, 4.

REAL ESTATE AGENTS:

See **BROKERS**.

REBUTTAL:

Scope of evidence, see **TRIAL**, 1.

Evidence in rebuttal, see **WITNESSES**, 2.

RECEIVERS:

Bond of as community debt, see **HUSBAND AND WIFE**, 7.

1. **RECEIVERS—APPOINTMENT—NOTICE.** An order appointing a receiver without notice, and without limiting the appointment to a day certain fixed by the court upon which a hearing can be had, is without jurisdiction and void. *State ex rel. Ridgely v. Superior Court* 584
2. **SAME—APPOINTMENT—PROCEEDINGS—VALIDITY—ESTOPPEL.** Where an order appointing a receiver without notice was void for want of jurisdiction, a motion to quash the order of appointment, and acquiescence in the order of the court denying the motion, does not estop the party from questioning the subsequent acts of the court in issuing a writ of assistance to put the receiver in possession; since the appointment being void, the court was without jurisdiction to issue the writ of assistance. *State ex rel. Ridgely v. Superior Court* 584
3. **RECEIVERS—RECEIVER'S BOND—LIABILITY OF SURETIES—ESTOPPEL.** Sureties on a receiver's bond, who intrusted the bond to the receiver for the purpose of securing the signature of the wife of one of them before filing, and who failed to examine the record and repudiate their liability for failure to secure the signature, cannot be heard to say that creditors, not parties to the suit, for whose benefit the bond was given, should have examined the record so as to know that the bond was defective; and the sureties, as the one of two innocent parties who made the injury possible, must suffer the loss. *Williams v. Hitchcock* 536
4. **SAME.** A consent in open court to an order making permanent a temporary appointment of a receiver, upon which was based a finding, without exception, that the temporary bond was a good and sufficient bond to protect all parties concerned during the continuance of the receivership, followed by judgment accepting the bond accordingly, is a ratification of the bond and precludes the parties to the action from asserting, as against creditors, that it was invalid for want of the signature of one of the sureties. *Williams v. Hitchcock* 536

RECORDS:

See **CHATTEL MORTGAGES**, 1.

On appeal, see **APPEAL AND ERROR**, 9-14.

Of conditional sale contract, see **SALES**, 4.

Writ of attachment and notice of levy as notice to subsequent purchaser, see **VENDOR AND PURCHASER**, 2.

REDUCTION:

Power of court to reduce judgment after entry on verdict, see **JUDGMENT**, 5.

REFORMATORIES:

Right of convict to privacy in reference to publication of photograph, see **CONSTITUTIONAL LAW**, 1.

Right to compel destruction of photographs taken of convict, see **INJUNCTION**, 2.

Mandamus to compel destruction of pictures taken of convict, see **MANDAMUS**.

1. **REFORMATORIES — REGULATION — IDENTIFICATION OF PRISONERS — POWERS OF MANAGERS—STATUTES.** The legislature, by outlining, in broad and general terms (*Rem. & Bal. Code, § 8577 et seq.*), the powers and duties of the board of managers of the state reformatory, without any complete system of specific rules or regulations, has by necessary implication accorded to the officers all those powers which experience has proven necessary, with a wide latitude of discretion; including the power to take and preserve, and send to police officers elsewhere, in good faith, photographs and physical measurements of prisoners, in order to prevent escape and to facilitate recapture, reformation, and the investigation of past records required by statute, and as an aid in enforcing the habitual criminal law. *Hodgeman v. Olsen*..... 615
2. **REFORMATORIES—REGULATION — IDENTIFICATION — RIGHTS OF PRISONERS.** When the board of directors of the state reformatory had the power to take and preserve photographs and measurements of prisoners, the taking of the same by their superintendent in charge invades no legal right, although the managers had made no rules or regulations authorizing the same. *Hodgeman v. Olsen*..... 615

REGISTRATION:

Of chattel mortgages, see **CHATTEL MORTGAGES**, 1.

REGULATION:

Act regulating commission merchants, see **FACTORS**.

Of conduct of taxicab drivers, see **MUNICIPAL CORPORATIONS**, 9-11.

Of state reformatory, see **REFORMATORIES**.

REINSTATEMENT:

Of judgment, see **JUDGMENT**, 13, 14.

RELEASE:

See **ACCORD AND SATISFACTION**.

REMAND:

Of cause on appeal or writ of error, see **APPEAL AND ERROR**, 36, 37.

REMEDY AT LAW:

Effect on jurisdiction of equity, see **INJUNCTION**, 1.

REMITTANCE:

By mail as payment, see **PAYMENT**.

REMITTITUR:

Correction of, see **APPEAL AND ERROR**, 39.

RENDITION:

Of judgment, time for, see **JUDGMENT**, 1.

REPEAL:

Of act as working cessation of controversy, see **APPEAL AND ERROR**, 6.

Of statute relating to incest, see **INCEST**, 2.

Of statute giving power to city to grant telephone franchise for use of streets, see **TELEGRAPHS AND TELEPHONES**, 2.

REPLEVIN:

Collateral attack on judgment, see **JUDGMENT**, 8.

1. **REPLEVIN—OWNERSHIP OF PROPERTY—DEFENSES—TITLE IN THIRD PERSON—ESTOPPEL.** Where a bank, upon request, delivered money in the mails by registered letter, addressed to the consignee, and it was stolen in transit and the bank sued to recover it, the defense of ownership by the consignee is unavailable, where the consignee had appeared as a witness on behalf of the bank and estopped himself from claiming title to the money. *Masterson v. Union Bank & Trust Co.* 560
2. **REPLEVIN—OWNERSHIP—EVIDENCE—SUFFICIENCY.** Evidence that \$2,500 was stolen from a registered mail package, intrusted to a Japanese, who made various purchases and was about to depart for Japan under suspicious circumstances, held sufficient to establish, in an action of replevin, that he stole the package, where his explanation of the possession of so much money was improbable. *Masterson v. Union Bank & Trust Co.*..... 560
3. **SAME.** In an action of replevin, evidence that the purchaser of articles stole, from the United States mails, money of certain denominations a few days before the purchases, and paid therefor with money of the same denominations, sufficiently establishes that the articles were purchased with the stolen money, in the absence of a showing that he had other money of like denominations. *Masterson v. Union Bank & Trust Co.*..... 560
4. **SAME—OWNERSHIP—BONA FIDE PURCHASER—KNOWLEDGE OF THEFT.** An attorney, securing from his client, charged with the theft of money, a bill of sale of articles recently purchased, cannot claim that he had no knowledge that the articles were purchased with the stolen money, where the bill of sale was made three days after the arrest of the client, and after attending the preliminary hearing at which the client was bound over to await the action of the grand jury. *Masterson v. Union Bank & Trust Co.*..... 560

REPRESENTATION:

Of corporation by officer, see CORPORATIONS, 3, 4.

RESCISSION:

Cancellation of written instrument, see CANCELLATION OF INSTRUMENTS.

Of contracts in general, see CONTRACTS, 6.

Of contract of sale, see SALES, 2, 3.

Of contract for sale of land, see VENDOR AND PURCHASER, 1.

RESIDENCE:

Statement of in claim against city for damages, see MUNICIPAL CORPORATIONS, 28.

RES JUDICATA:

See JUDGMENT, 9-13.

RESULTING TRUSTS:

See TRUSTS.

REVENUE:

See TAXATION.

REVIEW:

See APPEAL AND ERROR; CERTIORARI.

In criminal prosecution, see CRIMINAL LAW, 6-8.

REVIVAL:

Of debt by part payment, see LIMITATION OF ACTIONS, 4.

RIPARIAN OWNERS:

Title to beds and shores abandoned by state in improving stream, see NAVIGABLE WATERS, 3.

ROADS:

Streets in cities, see MUNICIPAL CORPORATIONS, 4, 5, 12-14, 17-21.

SALES:

Assignment of proceeds of crop sale, see ASSIGNMENTS.

On execution, see EXECUTION.

Preference by falling debtor as sale in bulk, see FRAUDULENT CONVEYANCES, 8.

Reinstatement of judgment after vacation of abortive sale on execution, see JUDGMENT, 14.

Of impure food, failure of proof, see PLEADING, 10.

By agents, see PRINCIPAL AND AGENT, 1-3.

Under junior execution, see SHERIFFS AND CONSTABLES, 1, 2.

Of realty, see VENDOR AND PURCHASER.

SALES—CONTINUED.

1. **SALES—OPTION—ACCEPTANCE—ACTION UPON.** Where an option to purchase machinery was acted upon by the purchasers, who took possession, dismantled and removed it from its previous location, changing its condition and status and destroying the identity of some of it, the option was accepted and the vendor could enforce payment of the agreed purchase price. *Lord v. Miller*..... 436
2. **SALES—RESCISSION BY VENDEE—DECEIT—RECOVERY OF PURCHASE MONEY.** Deceit in stating the earnings of a hotel by grossly overstating the amount, padding the register and filling the rooms with nonpaying roomers, warrants rescission of a sale of the business and furniture and recovery of the purchase money paid, where the same was relied upon by the purchaser. *Hayes & Porter v. Wood* 254
3. **SAME—RESCISSION—JUDGMENT—SCOPE OF RELIEF.** In an action to recover possession of hotel property sold, upon plaintiffs declaring a forfeiture for nonpayment of the purchase price, which was successfully defended on the ground of deceit, defendant asking a rescission, it is error to enter judgment for defendant for the money paid only; but the same should further provide for a cancellation of the sale, a return of the purchase money notes, and the restoration of possession to the plaintiff. *Hayes & Porter v. Wood*..... 254
4. **SALES—CONDITIONAL SALES—RECORDING—"SIGNED" BY VENDOR—VALIDITY—SUBSEQUENT CREDITORS—SPECIFIC LIEN—NECESSITY.** Although a conditional sales contract was not "signed" by the vendor, within the meaning of Rem. & Bal. Code, § 3670, providing that certain conditional sales of personal property shall be absolute as to subsequent creditors, etc., unless within ten days after taking possession by the vendee, a memorandum of the sale signed by the vendor and vendee, be filed in the auditor's office, it is valid as between the parties, and where the vendor retook possession for default, before any creditor acquired a specific lien on the property and before the appointment of a trustee in bankruptcy, the rights of the vendee were terminated and the trustee acquired no title to the property (overruling on rehearing *Id.*, 82 Wash. 209). *Jennings v. Schwartz* 202

SATISFACTION:

See ACCORD AND SATISFACTION.
 Of execution, see EXECUTION.
 Of judgment, see JUDGMENT, 14.

SELECTION:

Of homestead as taking of property without due process of law, see CONSTITUTIONAL LAW, 3.
 Of homestead, see HOMESTEAD.

SENTENCE:

In prosecution for being habitual criminal, see **CRIMINAL LAW**, 4, 5.

SEPARATE ESTATE:

Of spouse, see **HUSBAND AND WIFE**, 1, 2.

SET-OFF AND COUNTERCLAIM:

Counterclaim as affecting jurisdictional amount in controversy, see **APPEAL AND ERROR**, 1.

Offset of damages against benefits to property from improvement, see **MUNICIPAL CORPORATIONS**, 7.

Pleading matter of set-off or counterclaim, see **PLEADING**, 6.

SETTLEMENT:

See **ACCORD AND SATISFACTION**; **ACCOUNT STATED**.

Of case on appeal, see **APPEAL AND ERROR**, 13.

By executor or administrator, see **EXECUTORS AND ADMINISTRATORS**, 2.

SHERIFFS AND CONSTABLES:

Conclusiveness, as against indemnitors, of judgment against sheriff for wrongful attachment, see **INDEMNITY**.

1. **SHERIFFS AND CONSTABLES—LIABILITY—SALE UNDER JUNIOR EXECUTION.** Under Rem. & Bal. Code, § 515, making it the duty of the sheriff to indorse upon a writ of execution the time when he received it, and Id., § 657, requiring him to execute attachments against the same defendant in the order in which they are received, the sale must be made under the senior writ to enable the senior creditor to protect his interests by a bid at his own sale; and the sheriff and his official bondsmen are liable for the value of the goods, if sale is made at a less value under a junior writ, and it is not enough that the proceeds of the sale were applied to the judgment of the senior creditor. *Continental Distributing Co. v. Hays*..... 300
2. **SHERIFFS AND CONSTABLES—LIABILITY—SALE UNDER JUNIOR WRIT—MEASURE OF DAMAGES.** The measure of damages to a senior attachment creditor, for the sale of personal property by a sheriff under a junior writ, is the value of the property at the time of the sale, and not the difference between the price obtained and that which could have been obtained by a sale under the senior writ. *Continental Distributing Co. v. Hays*..... 300
3. **SHERIFFS—INDEMNITY BOND—ACTIONS—EVIDENCE OF LEVY—SUFFICIENCY.** In an action upon an indemnity bond, given to protect the sheriff upon the levy of a writ of attachment, the evidence sufficiently shows that the sheriff made the levy of the writ upon property already levied upon and in possession under a prior writ, where the uncontradicted testimony of the deputy sheriff was to the effect that plaintiff's attorney, upon demand on the sheriff for the return of the goods, directed the sheriff to hold the goods under plaintiff's

SHERIFFS AND CONSTABLES—CONTINUED.

writ in case the prior writ was released; especially where there was no evidence to overcome the presumption that the sheriff did his duty when the writ was delivered to him with demand for its levy, together with the bond of indemnity for his protection. *National Surety Co. v. Fry Co.*..... 118

SHORE LANDS:

On navigable waters, see **NAVIGABLE WATERS.**

SIGNATURES:

Of sureties to receiver's bond, see **RECEIVERS**, 3, 4.

To conditional sale contract, see **SALES**, 4.

Of testator, see **WILLS**, 2.

SLANDER:

See **LIBEL AND SLANDER.**

SOLICITATION:

Ordinance regulating solicitation by taxicab drivers, see **MUNICIPAL CORPORATIONS**, 9-11.

STATEMENT:

Of case or facts for purpose of review, see **APPEAL AND ERROR**, 10-14.

Of agent as admission against interest, see **CONTRACTS**, 8.

STATES:

Parties entitled to sue on bond of subcontractor on state work, see **BONDS.**

Title to beds and shores of navigable streams, see **PUBLIC LANDS.**

1. **STATES—ACTIONS—LIABILITY TO BE SUED—"SUIT AGAINST STATE"—CONDITIONS—VENUE.** An action brought against the state auditor and state highway commissioner to restrain these officers from certifying that certain sums are payable out of the state treasury and from drawing state warrants therefor, on the allegation that the contract under which state highway work is being done was void for fraud in its inception, is in effect an action against the state; and can be brought only by consent of and in the manner directed by the state; and under Rem. & Bal. Code, § 886, must be brought in Thurston county. *State ex rel. Pierce County v. Superior Court* 685
2. **STATES—RIGHT OF ACTION—TAXPAYER'S SUIT.** A taxpayer, suing as such, with no private interests involved, cannot maintain an action against the state to prevent the misappropriation of public moneys, since the power rests alone with the attorney general. *State ex rel. Pierce County v. Superior Court*..... 685

STATES—CONTINUED.

3. **SAME—TAXPAYER'S SUIT—RIGHT TO SUE.** The rule denying to taxpayers the power to sue state officers for the misappropriation of state funds is not affected by the fact that plaintiff has a right of action against other parties who are joined with the state, nor by the fact that a county has a greater interest in the fund than the state, as part of its appropriation of state funds to be used on roads in the county; nor by the fact that a taxpayer's action affords more prompt and efficient remedies. *State ex rel. Pierce County v. Superior Court* 685
4. **SAME—TAXPAYER'S SUIT—JURISDICTION—CAPACITY TO SUE—RIGHT TO OBJECT—WAIVER.** The objection that a taxpayer, as such, cannot maintain an action against the state to prevent the misappropriation of public moneys, which can only be brought by the attorney general, raises more than the question of mere legal capacity to sue, but asserts want of power to maintain the action; and hence can be raised by any party to the action or by the court and is not waived by failure of the attorney general to object. *State ex rel. Pierce County v. Superior Court*..... 685

STATUTES:

See **MECHANICS' LIENS.**

Repeal of act as working cessation of controversy, see **APPEAL AND ERROR**, 6.

Validity of relating to selection of homestead, see **CONSTITUTIONAL LAW**, 3.

Jurisdiction of courts, see **COURTS.**

Condemnation by county for highway through limits of city, see **EMINENT DOMAIN**, 1.

Act regulating commission merchants, see **FACTORS.**

Bulk stock laws, see **FRAUDULENT CONVEYANCES**, 8.

Selection of homestead, effect on title of heirs, see **HOMESTEAD**, 2.

Defining incest, see **INCEST.**

Of limitation, see **LIMITATION OF ACTIONS.**

Federal employers' liability act, see **MASTER AND SERVANT**, 6.

Attorney's fees on foreclosure of mortgage, see **MORTGAGES.**

Requiring filing of claims against city for damages, see **MUNICIPAL CORPORATIONS**, 27, 28.

Boundaries of shore lands, see **NAVIGABLE WATERS**, 1.

Powers of officers of state reformatory, see **REFORMATORIES.**

Power of city to grant telephone franchise, see **TELEGRAPHS AND TELEPHONES**, 1, 2.

Requiring signature of testator to will, see **WILLS**, 2.

1. **STATUTES—PARTIAL INVALIDITY.** Upon a prosecution for transacting a commission business without obtaining a license, the unconstitutionality of other provisions of the act cannot be inquired

STATUTES—CONTINUED.

- into; since the invalid part may be disregarded where the act is valid in part and separable and capable of execution. *State v. Bowen & Co.*..... 23
2. **SAME—PARTIAL INVALIDITY.** The act is not rendered invalid *in toto* by provisions for imprisonment for debt and recovery of attorney's fees in civil actions upon the bonds; since it may be assumed that the legislature would have enacted the body of the act independently of such questionable provisions. *State v. Bowen & Co.* 23
3. **SAME—PARTIAL INVALIDITY—INTERSTATE COMMERCE ACT.** The act is not invalid as to commerce carried on wholly within the state because it contravenes the Federal constitution relating to interstate commerce when applied to interstate commerce. *State v. Bowen & Co.*..... 23
4. **STATUTES—TITLE AND SUBJECTS.** Rem. & Bal. Code, § 561, of the homestead act, defining the character of the title acquired by the claimant, is sufficiently germane to the title "an act defining a homestead and providing for the manner of the selection of the same;" and hence is not unconstitutional as determining the method of descent of property without expressing the subject in the title. *Stewart v. Fitzsimmons*..... 55

STIPULATIONS:

1. **STIPULATIONS—EFFECT—ELECTIONS—CONTESTS.** In an election contest, insufficiency in the pleadings is waived by a stipulation that the ballots be produced and a recount made by the court. *State ex rel. Hufford v. Eddings*..... 233

STOCK:

Corporate stock, see **CORPORATIONS**, 1, 2.

STREAMS:

- Title to beds and shores on abandonment by state, see **NAVIGABLE WATERS**, 3.
- Title to beds and shores of navigable streams, see **PUBLIC LANDS**.

STREET RAILROADS:

Carriage of passengers, see **CARRIERS**.

1. **STREET RAILROADS—INJURIES—COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.** A driver of a team of horses is guilty of contributory negligence, as a matter of law, precluding any recovery for his death caused by colliding with an approaching car, where it appears that he was driving west on the wrong side of the street or making a diagonal cut across a jog in the street, and in a place where the law of the road and common

STREET RAILROADS—CONTINUED.

prudence required him not to be in, that he could have seen the approaching car in time to avoid the accident had he looked when he came in view before driving onto the track, but turned his horses at right angles abruptly in front of the car so that the off horse was struck in the shoulder and the accident made inevitable. *Arpagaus v. Washington Water Power Co.*..... 83

2. SAME—NEGLIGENCE—PROXIMATE CAUSE. Liability in such a case cannot rest upon the rule of wilful and wanton injury, as the proximate cause, since there was nothing to indicate to the motorman that the deceased intended to pull across the track, until the moment of the collision. *Arpagaus v. Washington Water Power Co.*..... 83

STREETS:

See MUNICIPAL CORPORATIONS, 4, 5, 12-14, 17-21.

Use for telephone lines, see TELEGRAPHS AND TELEPHONES.

SUPERSEDEAS:

Bonds on appeal, judgment against surety, see APPEAL AND ERROR, 38.

SUPPLIES:

Bond of contractor to secure payment for provisions and supplies used on public work, see MUNICIPAL CORPORATIONS, 1.

TAXATION:

Action to cancel tax deed, see CANCELLATION OF INSTRUMENTS.

1. TAXATION—PUBLIC LANDS—RIGHT TO PATENT—CONDITIONS PRECEDENT—EQUITABLE TITLE. No equitable title passes to a purchaser of government lots in the townsite of Port Angeles upon his paying the price and taking receipt therefor, until after performance of the condition precedent relating to improvements, and until then the lots are not subject to taxation; under 34 U. S. Stat. at L., ch. 2077, p. 167, which provides that no patent shall issue to any lot until the purchaser has proven to the satisfaction of the secretary of the interior that he has expended \$300 in permanent improvements on each lot purchased. *Wildy v. Henry*..... 387
2. TAXATION—ASSESSMENT—VALUATION—"MARKET" VALUE. Rem. & Bal. Code, § 9112, providing that property be assessed for taxation at its true and fair value, defined to be what it is fairly worth in money and that value at which the property would be taken in payment of a just debt from a solvent debtor, requires its assessment at its market value. *National Lumber & Manufacturing Co. v. Chehalis County* 483
3. SAME—ASSESSMENT—VALUATION—"MARKET" VALUE—EVIDENCE—SUFFICIENCY. An assessment of the personal property of a sawmill company is not invalid as not based upon its "market" value, be-

TAXATION—CONTINUED.

cause the assessor and board of equalization adopted the "depreciated" value as determined by an appraisal company upon consideration of its present condition, replacement value, and present utility, although owners testified that the market value, as shown by sales, was much less than the depreciated value, where there was evidence that the depreciated value furnishes a basis upon which banks extend credit and insurance companies pay losses and was what it was worth to the owner and substantially the same as its market value, and there was no clear evidence to overcome the conclusions of the board of equalization, acting in a quasi judicial capacity, such as a showing that the practical utility of the mill had been affected by exhaustion of the timber supply, or the like. *National Lumber & Manufacturing Co. v. Chehalis County*..... 483

4. **TAXATION—TAX DEED—CANCELLATION—FRAUD—ACTIONS—LIMITATIONS.** Rem. & Bal. Code, § 159, authorizing an action for relief upon the ground of fraud at any time within three years after the discovery of the facts constituting the fraud, is superseded, as to actions to set aside or cancel a tax deed for fraud, by the later act, Id., § 162, providing that actions to cancel a tax deed or recover lands sold for taxes, must be brought within three years from the date of the issuance of the tax deed. *Savage v. Ash*..... 43

TAXICAB DRIVERS:

Ordinance regulating conduct of, see **MUNICIPAL CORPORATIONS**, 9-11.

TAXPAYERS:

Right to sue state, see **STATES**.

TELEGRAPHS AND TELEPHONES:

1. **TELEGRAPHS AND TELEPHONES—FRANCHISES—POWER TO GRANT—CONDITIONS—STATUTES—CONSTRUCTION.** A city of the first class has power to grant a telephone franchise for the use of the city's streets and alleys, with any lawful conditions attached against sales or transfers to other companies without the consent of the city, or for forfeiture upon nonperformance of its undertakings, under Rem. & Bal. Code, § 7507, subd. 7, empowering first class cities to regulate and control the use of streets and alleys and to authorize or prohibit the use of electricity at, in or upon them, and to prescribe the terms and conditions upon which the same may be used and to regulate the use thereof. *State ex rel. Tacoma v. Sunset Telephone & Telegraph Co.* 309
2. **SAME—FRANCHISE—POWER TO GRANT—STATUTES—IMPLIED REPEAL.** Rem. & Bal. Code, § 7507, subd. 7, empowering cities of the first class to grant telephone franchises for the use of its streets and alleys, was not impliedly repealed by the enactment of the general telephone franchise act of 1890, Id., § 9300 *et seq.* *State ex rel. Tacoma v. Sunset Telephone & Telegraph Co.*..... 309

TELEGRAPHS AND TELEPHONES—CONTINUED.

3. **SAME—FRANCHISES—CONDITIONS—ACCEPTANCE.** Where a telephone franchise with attached conditions was accepted by the grantee, the franchise itself would be unauthorized if the qualifications and conditions imposed were beyond the power of the city, except as the terms and conditions are deemed subject to the general law. *State ex rel. Tacoma v. Sunset Telephone & Telegraph Co.* 309
4. **SAME—FRANCHISES—CONDITIONS AGAINST ALIENATION—VALIDITY—PUBLIC POLICY.** A condition in a telephone franchise ordinance that the grantee shall not sell or transfer the franchise or telephone system, except to a corporation to be organized by the original grantee, and expressly forbidding the transfer to any other telephone company without the consent of the city, evidently intended to maintain competition and prevent monopoly, is not void as against public policy, nor *ultra vires*. *State ex rel. Tacoma v. Sunset Telephone & Telegraph Co.* 309
5. **SAME—FRANCHISES—CONDITIONS AGAINST ALIENATION—MORTGAGES—INVOLUNTARY SALE.** A condition in a telephone franchise ordinance that the grantee shall not sell or transfer the franchise or telephone system, except to a corporation to be organized by the original grantee, and expressly forbidding the transfer to any other telephone company without the consent of the city, is not violated and a cause of forfeiture does not arise, by the giving of a voluntary mortgage, followed by an involuntary foreclosure and sale under which another telephone company acquired the franchise and telephone system; in view of Rem. & Bal. Code, § 520, which provides that franchises may be mortgaged and sold under execution or foreclosure, and Const., art. 12, § 8, providing that no corporation shall alienate any franchise so as to relieve the franchise or property from the liabilities of the grantee. *State ex rel. Tacoma v. Sunset Telephone & Telegraph Co.*..... 309
6. **SAME—FRANCHISE—FORFEITURE—COMPLIANCE WITH CONDITIONS.** A telephone franchise ordinance, referring in the first section to an automatic telephone system, but in the granting clause authorizing the grantee to use the streets for the transmission of sounds and conversation by electricity, and to construct an automatic telephone system, and a telegraph system, does not require the grantee to operate an automatic system exclusively; and abandonment of the automatic feature for a manual system is not ground for the forfeiture of the franchise for failure to comply with its terms; forfeitures being abhorred in the law and avoided if possible. *State ex rel. Tacoma v. Sunset Telephone & Telegraph Co.*..... 309
7. **SAME.** In such a case, the failure to furnish the city with sixty automatic telephones and desk extensions as provided in the ordi-

TELEGRAPHS AND TELEPHONES—CONTINUED.

nance, would not be ground for forfeiture of the franchise, where the grantee was furnishing the city with the required number of manual telephones. *State ex rel. Tacoma v. Sunset Telephone & Telegraph Co.* 309

TESTAMENTARY CAPACITY:

See WILLS, 1.

TIME:

Application for writ of certiorari, see CERTIORARI.
To move for judgment, see JUDGMENT, 1.
To move for judgment *non obstante*, see JUDGMENT, 2, 3.
For entry of judgment *non obstante*, see JUDGMENT, 4, 5.

TITLE:

Rescission for defect in title to property, see CONTRACTS, 6.
Conveyance of on sale under junior execution, see EXECUTION.
Of fraudulent grantee, see FRAUDULENT CONVEYANCES, 5.
To beds and shores abandoned by state in improving stream, see NAVIGABLE WATERS, 3.
To beds and shores of navigable streams, see PUBLIC LANDS.
To property, see REPLEVIN.
Statutes, see STATUTES, 4.
To public lands, conditions precedent, see TAXATION, 1.
To waters by adverse use, see WATERS AND WATER COURSES.

TOLLING:

Of statute by concealment of defendant, see LIMITATION OF ACTIONS, 3.

TORTS:

See LIBEL AND SLANDER; NEGLIGENCE.
Joinder of causes of action, see ACTION.
Measure of damages, see DAMAGES.
Interference with fishing rights, see FISH.
Accrual of action for, see LIMITATION OF ACTIONS, 2.
Of employers, see MASTER AND SERVANT.
Of city, see MUNICIPAL CORPORATIONS, 12-16.
Injury to partnership business, see PARTNERSHIP, 2, 3.
Agents, see PRINCIPAL AND AGENT, 1-3.

TRANSCRIPTS:

Of record for purpose of review, see APPEAL AND ERROR, 9-14.

TRIAL:

See NEW TRIAL.
Review of errors as dependent on presentation of same by record, see APPEAL AND ERROR, 9-14.

TRIAL—CONTINUED.

Review of verdicts, see APPEAL AND ERROR, 17.

Review of errors as dependent on prejudicial nature of same, see APPEAL AND ERROR, 28-35.

Instructions in action for injury in setting down passenger, see CARRIERS, 1.

Continuance of, see CONTINUANCE.

Of criminal prosecution, see CRIMINAL LAW.

Instructions as to manner of commission of offense, see GAMING.

Instructions as to commission of adultery, in action for alienation of affections, see HUSBAND AND WIFE, 9.

Right to trial by jury, see JURY.

Instructions in action for injuries to pedestrians struck by automobile, see MUNICIPAL CORPORATIONS, 17, 18, 21.

Instructions as to authority of agent, see PRINCIPAL AND AGENT, 3.

Impeachment of witness, see WITNESSES, 3.

1. TRIAL—SCOPE OF EVIDENCE—REBUTTAL. Where respondent had been satisfied to submit a check as bearing its own evidence of a different handwriting, and appellant undertook to establish that it was in the handwriting of the drawer, and so testified, it is not prejudicial error to allow a handwriting expert to testify in rebuttal that part of it was not in the drawer's handwriting. *Gardner v. Spalt* 146
2. TRIAL—PROVINCE OF COURT AND JURY—DIRECTING VERDICT OR JUDGMENT. A directed verdict, or judgment notwithstanding the verdict, can only be granted where the court can say, as a matter of law, that there is neither evidence, nor reasonable inference from evidence, to sustain the verdict of the jury. *Caughren v. Kahan*... 356
3. TRIAL—INSTRUCTIONS—CONSTRUCTION. Error cannot be predicated upon a detached part of an instruction, which was not erroneous when taken in its context, and reading the instruction as a whole. *Davis v. Wenatchee*..... 13
4. TRIAL—INSTRUCTIONS—ISSUES—PREJUDICE—OTHER CORRECT INSTRUCTIONS. In an action to recover for fraud in purchasing mining stock, at a price in excess of the price paid by defendant and others, contrary to the agreement of the parties, an instruction to the effect that defendant could not recover if he had notice, or as a reasonable man should have had notice of "the price he was paying for stock," is erroneous, as he admittedly knew such fact, and the issue was as to his knowledge as to the price paid by others; and the error is not cured by other correct instructions, given on the Saturday previous, where the erroneous instruction was given the next Monday morning as an additional instruction. *McDonald v. McDougall*. 339
5. TRIAL—INSTRUCTIONS—"PREPONDERANCE OF EVIDENCE." It is not error to instruct as to the preponderance of the evidence, that what

TRIAL—CONTINUED.

is meant is the best evidence—that which appeals to the jurors' intelligence as being the most probable, and as establishing certain facts. *Caughren v. Kahan*..... 356

6. **TRIAL—FINDINGS OF FACT—NECESSITY.** In an action at law in which issues of fact are tried out on the merits before the court without a jury, findings of fact are necessary to support the judgment; under Rem. & Bal. Code, § 367, providing that, upon the trial of an issue of fact by the court, its decision shall be given in writing, with the facts found and the conclusions of law separately stated. *Western Dry Goods Co. v. Hamilton*..... 478
7. **SAME—FINDINGS OF FACT—WAIVER.** Findings of fact, necessary to support a judgment in an action at law tried to the court on the merits, are not waived by appellant's failure to request such findings as the court is willing to make, after having denied plaintiff's requested findings. *Western Dry Goods Co. v. Hamilton*..... 478

TRUSTS:

Assignment of trust fund for labor claimants for harvesting crops, see **ASSIGNMENTS**.

Title of fraudulent grantee, see **FRAUDULENT CONVEYANCES**, 5.

Judgment in favor of implied trustee as bar to subsequent action, see **JUDGMENT**, 10.

Right to maintain action as trustee of express trust, see **PARTIES**, 2.

Validity of trust deed, conflict of laws, see **USURY**.

1. **TRUSTS—CREATION—RESULTING TRUSTS.** Where a wife's one-half interest in community property was devised to her husband for life or until he remarries, the remainder to her sons, upon his remarriage, lands purchased by him with funds derived from the community estate are held in trust for the sons. *Paysse v. Paysse*.. 349
2. **TRUSTS—CONVEYANCE BY TRUSTEE—GIFT—RIGHTS OF DONEE.** Where an undivided half interest in lands was held in trust for the sons of the title holder, his deed of gift of the lands to his wife entitles her only to his one-half interest, the other half being impressed with the trust; since the wife paid no valuable consideration and there is no element of estoppel in her favor. *Paysse v. Paysse*.. 349

UNLAWFUL DETAINER:

See **LANDLORD AND TENANT**.

Of leased premises before expiration of term, as action of ejectment, see **EJECTMENT**.

USURY:

1. **USURY—WHAT LAW GOVERNS—CONFLICT OF LAWS—INTENT—PRESUMPTIONS.** The law of this state, and not the law of Illinois, governs and determines the validity of railway bonds and a trust deed

USURY—CONTINUED.

securing the same, which bonds provided for a rate of interest that was legal in this state but illegal under the laws of Illinois, where it appears that the railway company, a Washington corporation, had its only place of business in this state, and signed and acknowledged the trust deed and signed the bonds in this state, pursuant to a tentative agreement made in the state of Illinois, that the bonds were headed "State of Washington," indicating that they were Washington securities, that the purpose of the loan was to promote the company's railway business wholly in this state, and that the trust deed provided notice of a certain option to be published in this state as well as in Illinois, and for the appointment of a new trustee by the superior court of this state; since the elements of the contract, even if to be performed in Illinois, had a situs in this state, and the contract being silent as to the intent of the parties respecting the governing law, it will be presumed that a legal contract was intended and such construction adopted as to render it valid. *Crawford v. Seattle, Renton & Southern R. Co.*..... 628

2. SAME. The same would be true of contracts and notes executed by the railway company, whereby all the stock of the company was pledged as security for the note indebtedness and deposited with a trustee in the state of Illinois, the duties and obligations of the company and the terms of the contract, and circumstances attending the transaction being substantially the same as under the trust deed and bond contract. *Crawford v. Seattle, Renton & Southern R. Co.* 628

VACATION:

See JUDGMENT, 7, 9.

Decree of distribution of decedent's estate, see EXECUTORS AND ADMINISTRATORS, 2.

Of judgment against infants, for fraud, see INFANTS.

VALUE:

Limits of jurisdiction, see APPEAL AND ERROR, 1, 2.

Of good will of partnership, evidence of, see PARTNERSHIP, 3.

For purpose of assessment, see TAXATION, 2, 3.

VARIANCE:

Between pleading and proof in civil action, see PLEADING, 7-10.

VENDOR AND PURCHASER:

Broker as procuring cause of sale, see BROKERS.

Election of remedy on breach of contract by vendee, see ELECTION OF REMEDIES.

Purchasers at executor's sale, see EXECUTORS AND ADMINISTRATORS, 3-5.

VENDOR AND PURCHASER—CONTINUED.

Purchasers of shore lands from state, see **NAVIGABLE WATERS**, 1.

Transfer of ownership of personal property, see **SALES**.

Purchaser of public lands, equitable title, see **TAXATION**, 1.

1. **VENDOR AND PURCHASER—SALE OF LAND—FRAUD—EVIDENCE—SUFFICIENCY.** In an action for rescission of a trade on the ground of defendant's fraud in falsely representing that 310 acres of his land was cultivated, findings for the defendant are sustained by his testimony and that of two other witnesses to the effect that defendant represented that there were about 310 acres cultivated, that it had never been measured and he did not know its exact area, but had bought it for that, and that plaintiff became suspicious and on that account demanded and received considerable additional personal property in the trade. *Cochran v. Remillard*..... 582
2. **VENDOR AND PURCHASER—BONA FIDE PURCHASER—CONSTRUCTIVE NOTICE—ATTACHMENT—RECORDATION—LIS PENDENS.** In an action commenced in one county, not affecting the title to land, an attachment levied upon land in another county, the title to which is in the defendant, by filing and recording in the auditor's office of such other county a copy of the writ and notice of the levy, as required by Rem. & Bal. Code, § 659, and indexed with defendant as grantor and plaintiff as grantee, as required by Id., § 8787, constitutes a valid lien upon the property to the extent of any judgment entered, preserving the lien, and is constructive notice to a subsequent purchaser from the attachment debtor, without the filing of any notice of *lis pendens*; notwithstanding Id., § 243, relating to the commencement of actions, provides that, in actions affecting title to real property, or whenever a writ of attachment of property shall be issued, the plaintiff may file with the auditor a notice of *lis pendens*; since under § 8787, *supra*, the notice of *lis pendens* is to be recorded and indexed in the same manner as a writ of attachment and notice of levy, and it was not intended to require the recording of both in the same place, in case of an attachment. *Dill v. Bush*..... 525

VENUE:

Right of defendant to change for bias of judge as class legislation, see **CONSTITUTIONAL LAW**, 2.

Of action against corporation, see **CORPORATIONS**, 5.

Of action against state, see **STATES**, 1.

VERDICT:

Review on appeal, see **APPEAL AND ERROR**, 17; **CRIMINAL LAW**, 7.

Inadequate or excessive damages, see **DAMAGES**.

Judgment notwithstanding verdict, see **JUDGMENT**, 2-5.

Impeachment by affidavit of jurors, see **NEW TRIAL**, 1.

Directing verdict or judgment, see **TRIAL**, 2.

VICE PRINCIPALS:

See **MASTER AND SERVANT**, 5, 7.

VOTERS:

Marking ballots, see **ELECTIONS**.

WAIVER:

Error waived in appellate court, see **APPEAL AND ERROR**, 16.

Indorsement of interest on note by bank as waiver of action against maker, see **BILLS AND NOTES**, 3.

Forfeiture of policy of insurance, see **INSURANCE**, 4.

Of charter provision requiring filing of claim for damages, see **MUNICIPAL CORPORATIONS**, 31.

Of objection to suit by taxpayer against state, see **STATES**, 4.

By stipulation, see **STIPULATIONS**.

Of findings, see **TRIAL**, 7.

WARRANTS:

Bar of action on local improvement warrant, see **LIMITATION OF ACTIONS**, 1.

Local improvement warrants, see **MUNICIPAL CORPORATIONS**, 22-26.

WATERS AND WATER COURSES:

See **NAVIGABLE WATERS**.

Condemnation of water system by city, see **EMINENT DOMAIN**, 6-8.

1. **WATERS AND WATER COURSES—ADVERSE USE—TITLE—EXTENT OF RIGHT.** The right to the use of flowing waters may be acquired by prescription, resulting in the vesting of title as if acquired by deed, the extent of the right depending upon the nature and character of the adverse uses. *Dontanello v. Gust*..... 268
2. **SAME—ADVERSE USE—BY LOWER PROPRIETOR—TITLE—EVIDENCE—SUFFICIENCY.** While generally the use of waters by a lower proprietor is not adverse, title to the waters of a spring is acquired by a lower proprietor, where, during the entire statutory period, he infringed upon the rights of an adjoining owner by constructing a ditch, dam and an intake on such other's land, below the spring, at the closest practicable point, and conducted the waters through the ditch to his own land for irrigation purposes, claiming the right to the waters under a posted notice, and during which times the adjoining owners might have maintained an action for the unlawful invasion of their property. *Dontanello v. Gust*..... 268

WILLS:

1. **WILLS—TESTAMENTARY CAPACITY—EVIDENCE—SUFFICIENCY.** Testamentary capacity to make a will, excluding various relatives, by one who had suffered a stroke of paralysis the day before and was partially disabled, is shown by the evidence of his lawyer and a banker,

WILLS—CONTINUED.

his intimate friend, who were the only persons present, to the effect that he had complete testamentary capacity, knew his property, his relatives and heirs at law, and the disposition he desired made of his estate. *Wilson v. Craig*..... 465

2. **WILLS — EXECUTION—"SIGNED"—STATUTES — CONSTRUCTION.** A testator, by making his mark after another has written his name at his request, "signs" the will, within the meaning of Rem. & Bal. Code, § 1320, requiring a will to be signed by the testator; and in such case, there is no room for the application of § 1321, providing that any person who shall sign the testator's name to a will shall subscribe his own name as a witness and state that he subscribed the testator's name at his request. *Wilson v. Craig*..... 465

WITNESSES:

Corroboration of female in prosecution for rape, see **RAPE**, 2-4.

1. **WITNESSES—EXAMINATION—REITERATION.** It is not error to curtail the examination of a witness by excluding reaffirmations of his former testimony. *Clough v. Monro*..... 507
2. **WITNESSES—CROSS-EXAMINATION—REBUTTAL.** Where, in an action for fraud in duplicating delivery slips for gravel sold, resulting in overpayments, a witness for defendant had endeavored to make it appear that a discount had been given to avoid trouble rather than because duplicates had been discovered, it was competent, on cross-examination, to show that the discount was equal to the entire profit on the contract. *Ryan v. Dowell*..... 76
3. **WITNESSES—IMPEACHMENT — IMMORALITY.** Upon the cross-examination of a witness, she may be required to answer as to whether she had not been convicted of keeping a house of prostitution. *Gardner v. Spalt*..... 146

WORK AND LABOR:

Liens for work and materials, see **MECHANICS' LIENS**.

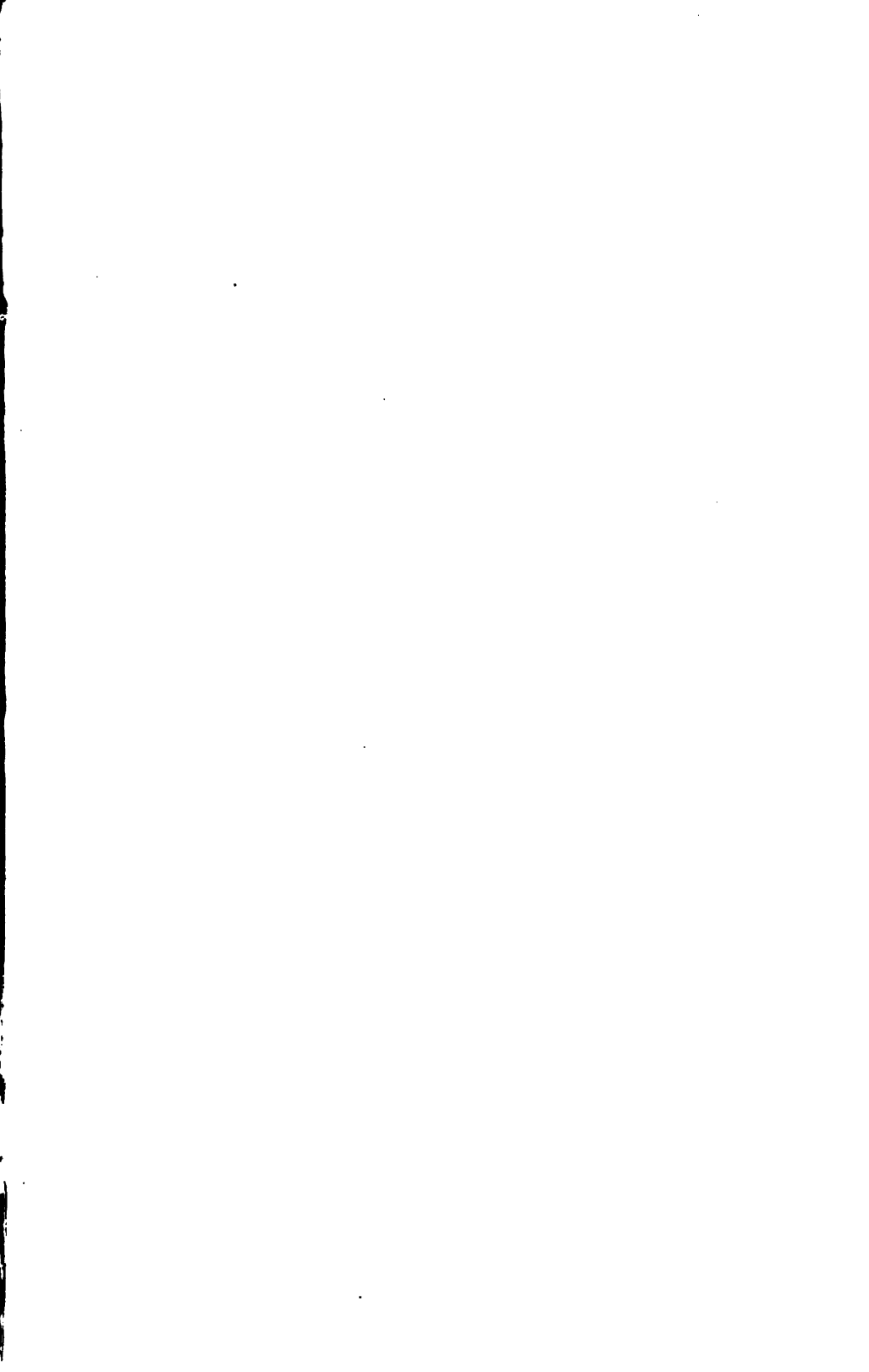
WRITINGS:

Parol evidence to vary or explain, see **BILLS AND NOTES**, 1; **EQUITY**; **EVIDENCE**, 5-7.

WRITS:

See **CERTIORARI**; **EXECUTION**; **INJUNCTION**; **MANDAMUS**; **PROHIBITION**; **REPLEVIN**.

Ex. F. B.
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